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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TOYS "R" US, INC. and TRU (HK) LIMITED,

Petitioners,

vs.

YUSUF AHMED ALGHANIM & SONS, W.L.L.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL S. FELDBERG*
ANTOINETTE PASSANANTE
SCHULTE ROTH & ZABEL LLP
900 Third Avenue
New York, New York 10022
(212) 756-2000

DENNIS J. BLOCK
STEPHEN A. RADIN
STEVEN ALAN REISS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Petitioner

**Counsel of Record*

QUESTIONS PRESENTED

1. Is clear legal error a basis for vacating an arbitration award?

2. What is the proper standard of judicial review of an arbitration award in the face of a claim that the award is clearly erroneous as a matter of law?

RULE 29.6 LISTING

Toys "R" Us, Inc. is not owned by any parent corporation. TRU (HK) Limited is a wholly-owned subsidiary of Toys "R" Us, Inc.

The following entities are partially owned by Toys "R" Us or its wholly-owned subsidiaries:

Toys "R" Us - Lifung Limited

Toys "R" Us - Lifung Taiwan Limited

Toys "R" Us (Malaysia) SDN. BHN.

Toys "R" Us - Japan, Ltd.

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PETITION FOR WRIT OF CERTIORARI

Toys "R" Us, Inc. and TRU (HK) Limited (collectively, "Toys 'R' Us") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals is reported at 126 F.3d 15 (2d Cir. 1997). The opinions of the District Court and of

the arbitrator are unreported. Each of the opinions is reproduced in the appendix.[1]

Jurisdiction

The Court of Appeals entered its judgment on September 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory and Contractual Provisions Involved

The pertinent provisions of the statutes and contracts involved are set forth in the appendix. (A-79-83.)

Statement of the Case

At a time when arbitration is becoming an increasingly utilized method of dispute resolution, the over $50 million award in this case — "reportedly the largest returned under American Arbitration Association jurisdiction in the past decade" (New York Law Journal, Dec. 19, 1996, at 4, col. 4) — presents an important question concerning the power of the courts to overturn an arbitration award where an arbitrator errs as a matter of law in interpreting a contract and awards damages in a clearly irrational amount. The decision of the court below is representative of recent decisions that effectively insulate arbitration awards from judicial review by vesting arbitrators with almost unchecked decision-making authority. If a clearly erroneous award cannot be reviewed by the courts for anything other than corruption or a blatant abuse of power by an arbitrator, then the number of matters submitted to arbitration almost certainly will be reduced. The result will be a decline in the utility of arbitration as a dispute resolution mechanism, and consequently an increase in the number of matters — especially complex business disputes — that will

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[1] All page references to the appendix are denoted in parentheses as "A-__."

have to be litigated in the already overburdened federal court system.

In this case a single arbitrator appointed by the American Arbitration Association ("AAA"), hearing a contract dispute between Toys "R" Us, Inc. ("Toys 'R' Us") and Yusuf Ahmed Alghanim & Sons, W.L.L. ("Alghanim"), which had a license to open Toys "R" Us stores in Kuwait and 13 other Middle East countries, erroneously determined that Toys "R" Us had no right to terminate the contract even though the contract explicitly granted both parties that right. The arbitrator also erroneously determined that Toys "R" Us had no right to insist that Alghanim toy stores conform to Toys "R" Us' usual standards, even though the contract explicitly granted Toys "R" Us th t right. The arbitrator then compounded his legal error by erroneously awarding Alghanim more than $50 million, based entirely on speculation about the profits Alghanim supposedly would have earned from operating Toys "R" Us stores in the ensuing 10 years, even though (a) in the 10 preceding years Alghanim's Toys "R" Us stores lost a total of $6.65 million, including losses virtually every year, and (b) Alghanim itself had asked for only $2 million to relinquish its rights.

The District Court refused to vacate the award because the arbitrator mentioned the contractual provisions at issue. (A-52.) The Court of Appeals stated it would not "overturn the arbitrator's award merely because we do not concur with the arbitrator's reading of the agreement" and held: "Interpretation of these contract terms is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation." (A-75.)

A. *The Underlying Agreement*

In November 1982, Toys "R" Us and Alghanim, a privately owned Kuwaiti conglomerate, entered into two agreements (collectively, the "agreement"). Toys "R" Us granted Alghanim a limited right, without the right to assign or grant sublicenses, to use Toys "R" Us trademarks and to open Toys "R" Us stores in Kuwait, as well as Bahrain, Egypt, Iran, Iraq,

Jordan, Lebanon, Oman, Qatar, Saudi Arabia, Sudan, Syria, United Arab Emirates and Yemen. (A-80.) Alghanim had to pay all the costs of store openings. (A-81.)

Paragraph 8.01 of the agreement gave each party the right to terminate on notice:

> This Agreement is effective as of November 16, 1982 and will remain in force for five (5) consecutive calendar years after the date of opening of the most recently opened [Alghanim] Toy Store in the territory; thereafter, the term of this Agreement will be automatically renewed for additional terms of two (2) consecutive calendar years each, unless either party shall give the other notice of its intention not to so renew not less than six (6) consecutive calendar months prior to the expiration of the initial or any renewed term then in effect. (A-82.)

Paragraph 2.07 of the agreement also obligated Alghanim to uphold the value of Toys "R" Us' trademarks, defined as "a unique and valuable asset of Toys "R" Us and "an inextricable element" of Toys "R" Us' "goodwill." Alghanim acknowledged that the use of Toys "R" Us trademarks "in conjunction with products of less than superior quality, or in association with less than the highest standards of advertising, promoting, selling and merchandising, would cause irreparable harm" to Toys "R" Us' goodwill and "incalculable injury" to Toys "R" Us trademarks. Accordingly, Alghanim agreed that:

> [Alghanim] will consult with [Toys "R" Us] in advance concerning the location, size, design, construction and layout of each [Alghanim] Toy Store and comply in all material respects with [Toys "R" Us'] usual standards concerning the same. (A-80-81.)

Paragraph 7.04 of the agreement obligated Toys "R" Us to direct to Alghanim any third party who made a bona fide offer to open a Toys "R" Us store in any of the 14 Middle East

countries specified in the agreement, and granted Alghanim a right of first refusal. If Alghanim declined such an offer or failed to open such a store within two years after receipt of such an offer, then the country for which the offer was made "would be deemed to have been deleted from the list of countries" covered by the agreement and Toys "R" Us would "be free thereafter to engage in the toy business in such country with or through such parties and in such manner as it chooses." (A-81-82.)

B. *Alghanim's Performance Under The Agreement*

From the signing of the agreement in 1982 until the commencement of arbitration in December 1993, Alghanim opened only four toy stores — all in Kuwait — and admitted that it lost $6.65 million. (A-105-08.) Alghanim made no effort to open any toy store in any of the 13 other countries set forth in the agreement, and after 1988 took no steps to open any new toy store in Kuwait. (A-108-09.)

It is undisputed that Alghanim lost money from this business each and every year except the year immediately following the Gulf war, when Kuwaitis restocked their homes — a total loss of $6.65 million. (A-105.)

C. *The Parties' Efforts to Terminate the Agreement*

After Kuwait's liberation from Iraq in 1991, both Alghanim and Toys "R" Us' concluded that the Alghanim toy business had not been a success for either party, and that the relationship between the parties needed to be changed. (A-100-04, 108.) Alghanim was "convinced that the way the business was done was wrong" (A-102), and was unwilling to commit further capital — a burden the agreement placed squarely on Alghanim — to a losing venture. (A-107, 110.) Accordingly, in September 1991 and February 1992, the parties met to try to restructure their agreement. When the parties could not agree on a restructuring, on July 20, 1992, Toys "R" Us tried to exercise its right to terminate the agreement. (A-94-95.) Alghanim responded on July 30, 1992, stating that its most recently opened toy store had opened on January 16, 1988

(not later in January 1988, as Toys "R" Us had believed), and that Toys "R" Us' July 20, 1992 non-renewal notice thus was four days late. (A-96-97.) According to Alghanim, Toys "R" Us' failure to provide notice of its election not to renew the parties' agreement by July 16, 1992 — six months before January 16, 1993, which was the fifth anniversary of the January 16, 1988 opening of Alghanim's most recently opened store — automatically extended the term of the agreement for an additional two years, until January 16, 1995. (*Id.*)

Toys "R" Us sent a second non-renewal notice on September 2, 1992. (A-98-99.) Even if Alghanim was correct in its interpretation that the agreement was automatically extended to January 16, 1995, Toys "R" Us' second notice unquestionably was sent more than six months before January 16, 1995, and thus was timely notice that the agreement would terminate not later than January 16, 1995. (A-82.) Toys "R" Us' September 2, 1992 non-renewal notice directed Alghanim not to open any new toy stores. (A-99.)

Alghanim took no steps to open a new toy store either before or after receiving Toys "R" Us' non-renewal notices, and in fact had not opened a new toy store since January 1988. Alghanim never claimed Toys "R" Us had no right to terminate the agreement. Instead, through the balance of 1992 and 1993, the parties tried, unsuccessfully, to negotiate a new arrangement or a termination of the agreement. In September 1993, Alghanim's Executive Vice President, Chief Operating Officer and the head of its toy business admitted that Alghanim was "no longer interested in being in the toy business" and that "we'll be happy to release the business right now," if Toys "R" Us "give[s] us $2 million for the losses we've incurred for trying to develop this business." (A-110.)

At the end of 1993, Toys "R" Us contracted with Al-Futtaim Sons Co., LLC ("Al-Futtaim") for the post-Alghanim rights to open Toys "R" Us stores in Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates, and with ATA Development Co. ("ATA") for the post-Alghanim rights to open

Toys "R" Us stores in Saudi Arabia. Al-Futtaim originally agreed to pay Toys "R" Us $15 million for the rights in Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates; ATA originally agreed to pay Toys "R" Us $15 million for the rights in Saudi Arabia. It is undisputed that Al-Futtaim reduced its payment to $11.325 million by holding back $3.675 million, the value it placed on the rights for Kuwait. It also is undisputed that ATA reduced its payment for Saudi Arabia to $7.5 million. Thus, Al-Futtaim and ATA actually paid Toys "R" Us a total of $18.825 million for the rights to Bahrain, Oman, Qatar, Saudi Arabia and the United Arab Emirates, and another $3.675 million for Kuwait.

D. *The Arbitration*

Despite paragraph 8.01 of the agreement, which expressly granted to both parties the right to terminate the agreement, the arbitrator erroneously found that Alghanim had the unilateral right to extend the "initial term" of the agreement indefinitely by opening new toy stores even if Toys "R" Us sent timely notice of non-renewal. The arbitrator further determined that Alghanim would have opened a new store by January 16, 1993, the last day of the "initial term", notwithstanding the undisputed evidence, specifically credited by the arbitrator, that it takes Toys "R" Us a minimum of eight to nine months to open a store which conforms to Toys "R" Us' usual standards, and that as of September 2, 1992, the date of Toys "R" Us' indisputably timely non-renewal notice, Alghanim had done nothing, indeed had not even selected a site, to prepare for such an opening. (A-108-09, 111.) Conceding that it would have been impossible for Alghanim to open a new store conforming to Toys "R" Us' usual standards by the January 16, 1993 termination date of the "initial term", the arbitrator found that Toys "R" Us had no right to enforce paragraph 2.07 of the agreement, opining that Toys "R" Us was using its right to insist on conforming stores "as a pretext to make it impossible for Alghanim to fulfill the condition for extension of the initial term." (A-29.)

The arbitrator then erroneously concluded that Alghanim would have pursued its toy business throughout the territory and earned profits over the ensuing 10 years with a net present value of $46.44 million, notwithstanding the facts that (a) Alghanim had only lost money on the business and all but abandoned it, and (b) there was no evidence that anyone valued Alghanim's rights at anywhere near that amount.

The arbitrator awarded Alghanim:

> (a) $9.41 million in "lost profits" for Kuwait, even though Alghanim had only lost money in Kuwait, and Al-Futtaim subsequently paid only $3.675 million for the right to open Toys "R" Us stores in Kuwait;
>
> (b) $27.58 million in "lost profits" for Bahrain, Oman, Qatar, Saudi Arabia and the United Arab Emirates, based on what ATA and Al-Futtaim had offered to Toys "R" Us, even though Alghanim never sought to open stores in any of those countries, Alghanim was contractually prohibited from assigning or sublicensing its rights in those countries, Alghanim had declined offers to open stores in those countries, thereby triggering the deletion provisions of the agreement, and ATA and Al-Futtaim actually paid only $18.825 million for the rights to open Toys "R" Us stores in those countries; and
>
> (c) $9.45 million in "lost profits" for Egypt and Jordan, even though Alghanim never sought to open any stores there, and no one placed any value on the right to open Toys "R" Us stores in those countries.

The arbitrator found that such damages were not speculative and distinguished the leading New York case prohibiting speculative damages, *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 502 N.Y.S.2d 131 (1986), on the ground that *Kenford* involved "damages based on future profits from concessions in a domed stadium that was never built" and at the time of the breach of contract in that case there was only one

other such facility in existence, whereas Toys "R" Us "has hundreds of toy stores worldwide." (A-46.) The arbitrator did not address the obvious fact that neither Toys "R" Us nor Alghanim — nor anyone else — had opened Toys "R" Us stores in the Middle East, other than Alghanim's unsuccessful stores in Kuwait.

In addition to $46.44 million in "lost profits" the arbitrator awarded Alghanim interest at 9 per cent per year beginning as of December 31, 1994. (A-47.)

E. *Proceedings Below*

The District Court's jurisdiction was invoked under 9 U.S.C. §§ 10-11 (the Federal Arbitration Act) and under 9 U.S.C. § 203 (the Convention for the Recognition and Enforcement of Foreign Arbitral Awards).

The District Court confirmed the award by Memorandum and Order dated December 13, 1996. (A-50-54.) On September 10, 1997, the Court of Appeals affirmed. (A-56-75.) The Court of Appeals cited its decision in *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984), which held that "the confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court," and its decision in *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988), which held that "the arbitrator need only explicate his reasoning under the contract in terms that offer even a barely colorable justification for the outcome reached..." (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 704 (2d Cir. 1978). Applying these principles, the Court of Appeals held that the arbitrator had not manifestly disregarded the law, finding that the arbitrator had "specifically addressed" *Kenford*, and noting that "mere error in the law or failure on the part of the arbitrator to understand or apply the law" does not constitute manifest disregard. (A-71-73, quoting *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991)).

On October 3, 1997, the Court of Appeals stayed its mandate pending this petition. (A-76-78.)

Reasons for Granting the Writ

Recent years have witnessed a remarkable increase in reliance on arbitration as a means of dispute resolution. In 1996, the American Arbitration Association administered a record total of 70,516 cases, a 13% increase over 1995. (A-84.) An even more dramatic increase occurred regarding international matters, as the case flow into the AAA's international case administration over that same time period more than doubled. (A-88-89.)

This increasing reliance on arbitration parallels the continuing expansion of disputes deemed arbitrable, fueled by a series of Supreme Court cases reflecting faith in the competence of arbitral tribunals to resolve even the most complex matters. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (ADEA claims); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (claims under the Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (RICO and Section 10(b) claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claims). This Court has expressly predicated its faith in arbitration on the premise that arbitration does not restrict parties' substantive rights, and that judicial review of awards, although necessarily limited, nevertheless is sufficient to ensure that arbitrators are following the law. *See, e.g., McMahon*, 482 U.S. at 232; *Mitsubishi Motors*, 473 U.S. at 628.

The reality, however, is that there is confusion and increasing uncertainty in the courts regarding the extent of substantive review of arbitration awards. The confusion stems from this Court's observation, more than 40 years ago, that an arbitrator's interpretation of the law, "in contrast to manifest disregard," is not subject to judicial review. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). This *dicta* — in a case that was overruled (albeit on a different ground) in *Rodriguez de Quijas, supra* — has spawned an entire body of divergent

caselaw, with this Court indicating that "manifest disregard of the law" remains a basis for vacating arbitration awards in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), but with lower courts continuing to struggle with what this standard means. The only thing clear from the current state of the law is that judicial review is *not* sufficient to ensure that arbitration awards follow the law. *See generally* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 774 (1996) ("To assert that the dictum from the Supreme Court's opinion in *Wilko v. Swan* has, after some forty years, left the federal circuit courts of appeals in a state of confusion...is an understatement."); Michael P. O'Mullan, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 Fordham L. Rev. 1121, 1124 (1995) ("[T]he federal courts of appeals are sharply divided over when review of an arbitration award is appropriate....").

A. This Court Should Grant Certiorari To Resolve A Split In The Circuits Over The Standard For Vacating An Award.

The circuit courts are seriously conflicted as to when an award is sufficiently baseless to warrant vacatur. *First*, although some circuits, following the *Wilko* dicta, allow the vacating of an award for "manifest disregard" of the law, other circuits have rejected the *Wilko* dicta and held that the statutory grounds for vacatur set forth in the Federal Arbitration Act, 9 U.S.C. § 10 (A-79) provide the sole bases for refusing enforcement of an arbitration award. The Seventh Circuit, for example, has rejected the concept of "manifest disregard" as "superfluous and confusing," indicating that it simply parallels the statutory ground of whether "the arbitrators exceeded their powers." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994). The Fourth and Fifth Circuits have likewise indicated that the only grounds for vacating an arbitration award are those expressly provided by statute. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143 (4th Cir. 1994),

cert. denied, 513 U.S. 1112 (1995); *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990).

Second, other circuits have recognized non-statutory bases other than "manifest disregard" of the law for the vacation of arbitral awards. The Ninth Circuit, for example, has espoused "complete irrationality" in addition to "manifest disregard" as a basis for vacatur. *Galaxie Boat Ctr., Inc. v. ITT Commercial Fin. Corp.*, No. 96-55175, 1997 U.S. App. LEXIS 14934 (9th Cir. June 19, 1997). The Eleventh Circuit has added an additional layer of complexity, rejecting the "manifest disregard" standard, but analyzing whether the award is "arbitrary or capricious" — but only if an opinion accompanies the award. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993). These varying formulations give little guidance as to when an award is substantively infirm and should not be enforced.

Third, there is confusion as to what the "manifest disregard" standard means. Some courts, including the Second Circuit, interpret the word "disregard" quite narrowly, requiring demonstrable evidence that the arbitrator "appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). The term "manifest" is ascribed an equally narrow meaning, held to require that the error be "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Id.* Nowhere, however, has there been any indication of what qualifications the "average" arbitrator should possess, or what distinguishes an ordinary error from an "instantly" perceptible one.

The ultimate effect of the Second Circuit's approach — requiring express acknowledgment and rejection of a governing principle — is to require a showing of affirmative, deliberate misconduct by the arbitrator before a court will vacate the award, even if the award itself is demonstrably wrong. For example, the court in *DiRussa v. Dean Witter Reynolds, Inc.*

concluded that an arbitrator did not "manifestly disregard" the mandatory attorneys' fee provision of the ADEA, despite the fact that the arbitrator rejected the request for attorneys' fees, because the attorneys had not expressly informed the arbitrator that attorneys' fees were mandatory, nor had the arbitrator explained his reasons for not granting fees. 121 F.3d 818, 1997 U.S. App. LEXIS 20505 at *10-11 (2d Cir. 1997). A petition for a writ of certiorari was filed in *DiRussa* on November 3, 1997, raising the question whether courts may modify or vacate an arbitration award in the face of a claim that the award was clearly erroneous as a matter of law. Likewise, the Court in *Exxon Shipping Co. v. Exxon Seaman's Union* indicated that an arbitrator's decision "need be neither wise nor internally consistent." 73 F.3d 1287, 1297 (3d Cir.), *cert. denied,* 116 S. Ct. 2515 (1996). This focus on the arbitrator's subjective state of mind is misplaced: if an award is plainly wrong, the arbitrator's subjective intent is irrelevant. Furthermore, as one commentator noted, manifest disregard under this test is "nearly impossible to prove because, even in the rare case where an arbitrator deliberately ignores controlling law, the arbitrator will not announce his misconduct." Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 Buff. L. Rev. 49, 94 (1997).

In contrast, the First Circuit has indicated that an arbitration award may be vacated upon a showing that the award was:

> (1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.

Advest, Inc. v. McCarthy, 914 F.2d 6, 8-9 (1st Cir. 1990). Under this more liberal standard, the arbitrator's subjective state of mind is irrelevant; the test is an objective evaluation of whether the award itself is fundamentally flawed.

B. This Court Should Grant Certiorari To Resolve Whether A Clear Legal Or Factual Error Can Serve As The Basis For Vacating An Arbitral Award.

There is also confusion among the lower courts on the basic question of whether an arbitrator's misreading of a contract is reviewable by a court. For example, the Fifth Circuit has deemed it an "excess of power" under 9 U.S.C. § 10 if an arbitrator makes an "unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake," *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 214 (5th Cir. 1993), whereas the Second Circuit has interpreted the "excess of powers" provision much more narrowly, confining it solely to the question of whether an issue was actually presented to the arbitrator, not whether the arbitrator correctly resolved that issue. *DiRussa v. Dean Witter Reynolds Inc.*, *supra*, 1997 U.S. App. LEXIS at *17. The Sixth Circuit has added its own twist to the statutory grounds, expanding the meaning of "excess of powers" to encompass situations in which the award fails to "draw its essence" from the parties' contract. *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990). There is thus confusion among the circuits on the basic question of the judiciary's authority to review arbitral awards for legal or factual error. Given this Court's repeated endorsement of arbitration for dispute resolutions, it is incumbent upon this Court to resolve that uncertainty.

Indeed, the confusion over the degree — if any — to which federal courts can vacate arbitral awards for legal or factual error has encouraged unreasoned arbitral decisionmaking. This is reflected in the directive of the American Arbitration Association that its arbitrators should give as little insight as possible into the reasons for their awards:

> [o]ne reason for brevity is that written opinions might open avenues for attack on the award by the losing party....a carelessly expressed thought in a written opinion could afford an opportunity to delay

> enforcement of the award. The obligations of the parties are better fulfilled when the award leaves no room for attack. (A-92.)

The AAA further advises its arbitrators not to explain their award later, in part because "[a] party might try to impeach the award by getting the arbitrator to divulge his or her reasoning or thought processes." (*Id.*)

Somewhat perversely, the principles governing judicial review of arbitral awards in some circuits encourage arbitrators not to explain their awards. Lower courts have declined to overturn awards on the ground that arbitrators have not explained their reasoning. For example, the Second Circuit in *DiRussa v. Dean Witter Reynolds* upheld an award which, on its face, contravened a federal statute mandating the award of attorneys' fees, in large part because the arbitrator had not expressly set forth the reasons for rejecting the request for such fees. 1997 U.S. App. LEXIS 20505 at *10-11. The Eighth Circuit in *Stroh Container v. Delphi Industries* likewise found that it could not deem an award to be in "manifest disregard of the law" because the arbitrators' decision neither indicated what law was applied nor what reasoning or analysis were used. 783 F.2d 743, 751 (8th Cir. 1986). The court in *Stroh* indicated its view that arbitration is an "inferior system of justice," in part because arbitration is structured without "accountability of judgment and rules of law." 783 F.2d at 751 n.12. The Eleventh Circuit questioned whether it should bother to adopt the "manifest disregard" standard, "since the standard would likely never be met when the arbitrator provides no reasons for its award (which is typically the case)," *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990), and later indicated that it would not consider *any* non-statutory bases for vacatur of lump-sum awards unaccompanied by written opinions. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d at 779.

In short, certiorari should be granted to address the need of federal courts for guidance in what has become an increasingly important — yet increasingly lawless — area of law.

Although some of the distinctions drawn by the lower courts may be semantic, the critical question which this case presents is whether there is to be any meaningful judicial review of arbitration awards in the absence of evidence of corruption or misconduct. If the answer is no — that so long as arbitrators mention the relevant contractual provisions and case law and appear to be trying to apply them, or say nothing at all, the award stands — the lower courts and the business world should be so advised so that they can make intelligent decisions about whether to submit controversies to arbitration knowing there is no meaningful judicial review. If, on the other hand, the concept of "manifest disregard" means that courts may overturn a clearly erroneous arbitration award, the lower courts and the commercial world should also be so advised. *See generally* Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 Ind. L. Rev. 241, 261-63 (1993) (noting that circuit courts are "hopelessly confused and inconsistent" and that "parties must know up-front what grounds are available for vacating arbitration awards in order for the commercial arbitration process to serve its intended purpose.").

C. The Award In This Case Would Be Vacated If Subjected To Meaningful Judicial Review.

The award in this case erroneously reorganizes the rights of the parties in a manner for which the parties certainly never bargained. The parties bargained for a contract which either party could terminate upon timely notice, as reflected in paragraph 8.01 of the agreement. Despite having acknowledged the existence of this unambiguous contractual provision, the arbitrator nevertheless ruled that if Alghanim were to open a new store

> at any time up to the last day of the initial period, the initial period would be extended for an additional five year period from the opening of that new store, *regardless even of timely notice of non-renewal.* (A-6-7) (emphasis added).

Using this clearly erroneous reading of the contract, the arbitrator proceeded to determine that Alghanim would in fact have been able to extend the agreement by opening a new store by January 16, 1993, the last day of the initial period. Faced with the absence of any evidence that Alghanim could have timely opened a store conforming to Toys "R" Us' usual standards, the arbitrator mistakenly decided that Alghanim need not be held to this part of its bargain, asserting that Toys "R" Us had invoked paragraph 2.07 of the agreement as a "mere pretext to make it *impossible* for [Alghanim] to fulfill the condition for extension of the initial term." (A-29.) (emphasis added). In reaching this decision, the arbitrator incorrectly opined that, notwithstanding the express terms of the contract, Toys "R" Us really did not care whether or not stores bearing its name conformed to its usual standards because Toys "R" Us "was being compensated under the [agreement] by royalties and commissions, payable whether or not [Alghanim's] toy stores were profitable." (*Id.*)

Through these erroneous revisions of the contract, the arbitrator granted to Alghanim, at Toys "R" Us' expense, rights which Alghanim had not obtained at the bargaining table. If the "initial term" of the contract ended on January 16, 1993, it is undisputed that Alghanim suffered no damages. The arbitrator wrongly found, in contrast, that Alghanim could and did extend the contract indefinitely, and then wrongly proceeded to issue a "lost profits" award exceeding $50 million to a party which had not had any profits or reasonable expectation of any.

A clearly erroneous standard of review would have required vacating the arbitrator's award. The District Court upheld the award simply by pointing to pages in the arbitrator's opinion which addressed the contractual provisions which Toys "R" Us contended had been ignored. (A-52). The Court of Appeals, noting that it could not "overturn the arbitrator's award merely because we do not concur with the arbitrator's reading of the agreement," adopted the District Court's reasons for upholding the arbitrator's treatment of the contract. (A-75). But the pages of the arbitrator's opinion cited by the

District Court and the Court of Appeals clearly demonstrate that the arbitrator refused to permit Toys "R" Us to enforce paragraphs 2.07 or 8.01 of the agreement according to their terms. (A-6-7, 29, 52). The arbitrator was not "interpreting" the agreement: he — whether intentionally or unintentionally — refused to enforce it. Meaningful judicial review would have corrected this fundamental conflict between the express terms of the contract and the arbitrator's finding.

Here, however, under the "manifest disregard" standard, neither court below reached the question of whether the arbitrator's reading of the contract was correct — or even logical.

Moreover, neither court addressed the irrationality of awarding $50 million in "lost profits" for stores which had never opened (or even been contemplated) in regions in which neither Alghanim nor Toys "R" Us had ever demonstrated any business success. Alghanim acknowledged that over a ten year period, it lost a total of $6.65 million running Toys "R" Us stores in Kuwait, including losses virtually every year it operated. Alghanim also acknowledged that over the same ten year period, Alghanim *never* expanded outside Kuwait, despite having the right to do so, and despite receiving dozens of referrals from Toys "R" Us of inquiries from third parties interested in opening Toys "R" Us stores in Middle East countries covered by the parties' agreement, including such obviously well-financed sources as the Saudi royal family. Nowhere did Alghanim — or the arbitrator — ever explain how Alghanim possibly could have converted an over $6 million loss by an operation that for 10 years was unwilling or unable to expand its business beyond Kuwait into an enterprise spanning the Middle East and earning a more than $50 million profit. An award of more than $50 million in lost profits for an alleged breach of contract to a business that only lost money before the contract allegedly was breached plainly is irrational.

Furthermore, Alghanim itself asked for only $2 million to relinquish its rights under its contract with Toys "R" Us in September 1993, a full year *after* Toys "R" Us' alleged

breach of contract. (A-109-10.) While the arbitrator adopted Alghanim's depiction of this fact simply as a "claim" by Toys "R" Us concerning a conversation between a Toys "R" Us official and an Alghanim official, the record belies Alghanim's contention. Keith Van Beek of Toys "R" Us testified concerning what he was told by Amin Kadrie of Alghanim. Mr. Kadrie, who attended most of the arbitration proceedings, including the sessions at which Mr. Van Beek testified, did not contradict Mr. Van Beek's testimony under oath. Mr. Kadrie's silence confirms that exactly what Mr. Van Beek testified to did in fact happen: Mr. Kadrie valued his own business at $2 million. The arbitrator's award of *25 times* that amount is completely unsupportable.

Rather than address the substance of these undisputed facts, however, both courts below noted that the arbitrator had "specifically" mentioned *Kenford*, the leading New York case barring the award of speculative lost profits, and therefore concluded that there had been no manifest disregard of New York law. Had there been meaningful, substantive evaluation of the award, the courts would have had to address the fact that as a matter of law, the arbitrator's distinction of *Kenford* was just plain wrong. The damages award in this case was entirely speculative and completely irrational because Alghanim produced no evidence that even begins to demonstrate how Alghanim could have transformed a ten-year operating history which resulted in $6.65 million in losses into a business that could generate $46.44 million in profits.

Certiorari should be granted to clarify whether the federal courts have the authority to remedy such unwarranted reorganization of the parties' contractual rights. Absent such clarification, parties will enter arbitration agreements at their peril, and the courts will continue to issue confused and contradictory decisions as to the scope of judicial review of arbitral awards.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

MICHAEL S. FELDBERG*
ANTOINETTE PASSANANTE
SCHULTE ROTH & ZABEL LLP
900 Third Avenue
New York, New York 10022
(212) 756-2000

DENNIS J. BLOCK
STEPHEN A. RADIN
STEVEN ALAN REISS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Petitioner

**Counsel of Record*

December 8, 1997

Partial Award of Arbitrator

AMERICAN ARBITRATION ASSOCIATION
Arbitration Tribunal

In the Matter of the Arbitration between

Re: 13 T 133 01103.93

TOYS "R" US, INC. AND TRU (HK) LIMITED

and

YUSUF AHMED ALGHANIM & SONS, W.L.L.

PARTIAL/AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into between the above-named Parties and dated November 16, 1982, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, FIND, as follows:

This partial award relates solely to a specific question that the parties agreed should be submitted to the tribunal for a partial award prior to evidentiary hearings in the future. The question requires interpretation of an Agreement[1] between Toys R Us, Inc. ("TRU") Claimant and Yusuf Ahmed Alghanim & Sons, W.I.I ("YAAS") Respondent, relating to an exclusive distributorship arrangement to be carried out in various counties [sic] in the Middle East by YAAS.

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[1] There are two agreements with termination provisions that differ in ways that the parties agree are not material and they are collectively referred to as the Agreement for simplicity.

At a preliminary hearing in this matter, both parties agreed that this question was presented to the Arbitrator for binding partial award on an agreed record:

> "Did the contract terminate on December 31, 1993 and if it did not terminate, when would it terminate?"

The record jointly submitted by both parties consists of the Agreement, certain correspondence between the parties, including particularly a letter from TRU to YAAS dated July 20, 1992, purporting to give notice of non-renewal effective as of January 31, 1993 (the "July Notice") and another letter from TRU to YAAS dated September 2, 1992 purporting to give notice of non-renewal effective as of December 31. 1993, as well as purporting to order YAAS not to open any additional stores in the territory (the "September Notice"). Both parties submitted briefs and reply briefs. Oral argument was had before the arbitrator on April 19, 1994.

The parties have agreed that the material facts necessary to decide the issues presented are not disputed. The questions posed by the parties does, however, requires ascertaining the meaning of two sections of the Agreement, as to which the parties have completely different interpretations.

The two clauses in the Agreement central to the case are these:

> "8.01. This Agreement is effective as of November 16, 1982 and will remain in force for five (5) consecutive calendar years after the date of opening of the most recently opened Toy Store in the territory; thereafter, the term of this Agreement will be automatically renewed for additional terms of two (2) consecutive calendar years each, unless either party shall give the other notice of its intention not to so renew not less than six (6) consecutive calendar months prior to the expiration of the initial or any renewed term then in effect".

This clause is referred to as "Section 8.01."

> "1.02 "calendar year" means a Gregorian calendar year ending on the 31st day of December, and all dates and periods of time referred to herein are with respect to a calendar year."

This clause is referred to as "Section 1.02."

The parties' question to the Arbitrator has two parts. The first part, "did the contract terminate on December 31, 1993," turns on the meaning of the term "calendar year" in Section 8.01. The second part, "if it did not terminate, when would it terminate," turns on the meaning of the term "initial period" and the effect of notice of non-renewal under Section 8.01.

Based on the arbitrator's interpretation of the Agreement and giving such weight to the agreed record as was considered appropriate, the arbitrator awards as follows:

Part One: Did the contract terminate on December 31, 1993?

Section 8.01 employs the term "calendar year," which is defined in section 1.02 of the agreement. Based on my interpretation of the Agreement and review of the record, I am persuaded that the correct interpretation of the term "calendar year" as used in Section 1.02 is that it means a year of 365 days, as opposed to any other kind of year, such as an Islamic year of 354 days, and a year ending on December 31, as opposed to a year ending on some other date, such as fixed by Islamic custom. Section 1.02 states that its definition of "calendar year" applies to "all dates and periods of time referred to herein...." I interpret that provision to mean that the definition itself must be construed with enough flexibility to accommodate application of the defined term for all periods mentioned in the Agreement.

TRU's primary argument is that "calendar year" invariably means a year from January 1 to December 31 and never anything else. TRU's interpretation makes the provisions of

several provisions of the Agreement, e.g, Sections 3.04, 7.04 and 8.03 awkward, if not impossible[2] .

I can find no basis in the Agreement for supposing that one must always add an arbitrary period to make any annual period coincide with years that end on December 31. If the drafters had intended such a curious construction, which in all my experience I have never seen or heard of in a contract, I would expect them to have made that point expressly. Finding no such express language, I have determined that the term "calendar year" as defined in Section 1.02, must be read to avoid such problems. I therefore determine that the term "calendar year" means 365 days unless the context requires that the year end date, December 31 be used.

On the basis of my interpretation of the meaning of Section 1.02, I cannot accept TRU's interpretation of Section 8.01. It is not disputed that the most recent opening of a Toy Store by YAAS occurred on January 16, 1988. TRU argues that "five (5) consecutive calendar years after the date of opening of the most recently opened Toy Store in the territory" means that we begin counting not on January 16, 1988, but on December 31, 1988. TRU's analysis supposes, as it must, that an additional period from January 14, the day the last store opened, until December 31, to bring the period into sequence with subsequent years beginning ending on December 31. For the reasons discussed above, I can find no basis in the Agreement

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[2] For example, Section 8.03 provides that YAAS has the right, at any time after the expiration of a period of "two years from the commencement date hereof..." to terminate with respect to certain countries. I think that the plain meaning of that clause is that the period would be measured by two calendar years of 365 days from November 16, 1982, the commencement date of the Agreement. Similarly, Section 7.04 provides for a situation where YAAS does not open a store within "two (2) years from the date such offer is referred to YAAS..." Under the TRU construction of Section 1.02 we would have to suppose that the period referred to in Section 7.04 would be extended by a period necessary to make the two year period coincide with a year ending on December 31. Based on my interpretation of the entire Agreement, I find that it is much more likely that the drafters of the Agreement meant two years from a specific date.

for adding that arbitrary period to the term and I decline to do so[3]. As set forth in Conclusion, below, I find that the Agreement did not terminate on December 31, 1993.

Part Two: If the Agreement did not terminate, when would it terminate?

YAAS argues that TRU's failure to provide effective notice of non-renewal did not merely allow the automatic renewal of the term the Agreement for two years to January 16, 1995[4]. It argues in addition that YAAS was still in the "initial period" mentioned in section 8.01 and would remain in that period at least until January 16, 1993, when the five year initial period ran out.

If, however, YAAS had opened a store before January 16, 1993, YAAS claims that it would still be operating under the first part of section 8.01. The new store would then become the "most recently opened Toy Store" and the five year term would begin to run anew. YAAS argues that section 8.01 contemplates that so long as it continues to open stores the agreement could be perpetually extended.

YAAS argues that the first part of section 8.01, which ends with a semicolon, is moreover followed by the word "thereafter," which introduces the part dealing with the procedure for termination by notice. YAAS reads "thereafter" to refer to the date on which the last store is opened, regardless

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[3] TRU also argues that its chief financial officer's interpretation in July, 1992, supposedly "mistaken," and which is the exact opposite of the position it now takes in this proceeding cannot be considered because the section 8.01 is clear and unambiguous on its face. TRU's argument is unpersuasive because the officer's interpretation, consistent with that urged by YAAS, is convincing proof at the very least that there are two possible interpretations of the termination clause that can be entertained by rational minds, if it is not as well, a binding admission, as YAAS argues.

[4] The parties agree that no grounds for termination for cause are present.

of whether the last store was opened during the initial period or a subsequent renewal period[5].

TRU does not disagree that the "initial period" could continue indefinitely for successive five year periods if YAAS actually continued to open stores during the initial period. Thus, for example, if YAAS had opened a store on January 1, 1992, the initial period would have been extended by the first clause of section 8.01 until December 31, 1997. TRU notes, however, that it is undisputed that YAAS opened only the one store on January 16, 1988 and never did open another. It argues that once the "initial period" runs out, there can never again be another "initial period." Thus TRU contends that if YAAS opened a store during the two year renewal period, the opening of that store would not have the effect of creating a new five year "initial period."

It seems to me that the most logical meaning of "initial period" is that it is the one, only and unique initial period that began when the Agreement began and ends permanently the first time a five year period expires without a new store being opened by YAAS.

Under Section 8.01 the effect of a notice of intention not to renew is not itself termination. It is merely the prevention of an otherwise automatic renewal. The giving of such a notice cannot itself affect any rights the parties then have under the Agreement[6] .

One of the rights YAAS has under the Agreement is the right to open stores. It seems to me that fairly interpreted, Section 8.01 means that however the initial period may have been prolonged by the opening of additional stores, if YAAS were to open a new store at any time up to the last day of the

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[5] During a renewal period, the Agreement is in full force and effect and presumably YAAS has all available rights thereunder, including the right to open additional stores.

[6] It follows, *a fortiori*, that a notice that is untimely cannot cut off any rights of the other party.

initial period, the initial period would be extended for an additional five year period from the opening of that new store, regardless even of timely notice of non-renewal.

However, in the case before us, YAAS did not open any other store during the initial period.

It is not disputed that the Agreement does not give TRU any right to issue a direction not to open additional stores or to refuse to perform its other obligations under the Agreement. The September Notice purported to do just that[7]. YAAS treats this part of the notice as a repudiation of the Agreement, the effect of which is to act as a breach of the Agreement as of September 2, 1992.

YAAS argues that the breach acts to estop TRU from claiming that the initial period ended due to YAAS's failure to open a store between that date and January 16, 1993. In effect, YAAS argues that since it was ready, willing and able to open a store, it should be treated as having actually done so for purposes of evaluating its rights into the future for damage purposes[8]. Thus, YAAS argues, far from merely being extended until January 16, 1995, the initial term should be deemed to go on indefinitely.

I cannot go so far on this small agreed record. It may be possible for YAAS to show by proof that TRU so abused the relationship in September, 1992 and thereafter that it should be responsible for the future profits YAAS would have reaped into the distant future. However, no such proof has yet been presented. TRU may yet establish that its September Notice was, at the very least, effective to operate as a notice of

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[7] The Sepember Notice states:

> "We [TRU] direct YAAS to cease any efforts to open any new YAAS stores in the territory..."

[8] YAAS notes that for the purposes of these proceedings, it is merely representing that it will be able to prove these facts at future evidentiary hearings.

non-renewal more than six months before the new renewed termination date of January 16, 1995.

Conclusion

For all purposes in the further proceedings in this matter, I answer the questions submitted to the tribunal as follows:

1. The Agreement did not terminate on December 31, 1993.

   YAAS opened its last store on January 16, 1988, and the five calendar year initial period specified in section 8.01 would have expired on January 16, 1993. For notice of non-renewal under section 8.01 to be timely, TRU would have had to give it six calendar months before January 16, 1993, that is, not later than by July 16, 1992. TRU did not do so, as its July Notice was not sent until July 20, 1992. It was therefore ineffective. The September Notice purported to give notice of non-renewal effective December 31, 1993. Since the Agreement had been automatically renewed until at least January 16, 1995, that notice did not have the effect of terminating the Agreement as of December 31, 1993.

2. As to when the Agreement "would terminate," several dates are possible, depending on further proof which is not yet in the record:

   a. The Agreement has been automatically renewed until January 16, 1995;

   b. However, if in further proceedings it is established that but for the alleged breach by TRU[9], YAAS would have opened a store or stores on dates *prior* to January 16, 1993, the initial period under Section 8.01 will be treated as having been extended for five

[9] Breach of the Agreement by TRU must also be established.

years of 365 days from the date the last such store would have opened. If it can be established on the same basis that YAAS would have opened other stores during that five year period, the initial period in Section 8.01 will be correspondingly extended.

c. If it is established that but for the alleged breach by TRU, YAAS would have opened stores but only *after* January 16, 1993, the "initial period," having ended on January 16, 1993, will *not* be treated as resurrected at the time such a store would have opened; the Agreement will be treated as having only successive two year renewal periods, the first of which expires January 16, 1995.

Nothing in this partial award should be taken as expressing any views on what conclusions may be reached with respect to anything other than the questions submitted.

All other matters are reserved until such evidence as the parties provide has been heard in the due course of further proceedings before this tribunal.

/s/ W.L.D. Barrett 5/4/94
William L.D. Barrett, Esq./ DATED

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, William L.D. Barrett, Esq., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

5/4/94	W.L.D. Barrett
(DATED)	(SIGNATURE)

Memorandum of the Arbitrator and Award of Arbitrator

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration	X	
between	:	
Toys "R" Us, Inc. and TRU (HK) LIMITED,	:	No. 13 T 133 01103 93
Claimants,	:	
– and –	:	
YUSUF AHMED ALGHANIM & SONS, W.L.L.,	:	
Respondent.	X	

MEMORANDUM OF THE ARBITRATOR

INTRODUCTION

Toys "R" Us Inc., is a Delaware corporation with its principal place of business in Paramus, New Jersey. TRU (HK) Limited, an affiliate of TRU, is a company registered and existing under the laws of the British Crown Colony of Hong Kong, with its principal place of business in Hong Kong. (These entities are collectively referred to as "TRU".) Yusuf Ahmed Alghanim & Sons, W.L.L. ("YAAS") located in Kuwait City, Kuwait, is one of 52 businesses owned by Alghanim Industries ("Alghanim"), a privately-held company that is headquartered in Kuwait and has offices throughout the Middle East.

This arbitration involves a License and Technical Assistance Agreement ("L&T Agreement") and a Supply Agreement (collectively "the Agreements") dated November 16, 1982 between TRU and YAAS. The Agreements, which will be discussed in more detail below, provide in general that

TRU granted YAAS extensive and exclusive rights to open and run TRU toy stores in a territory that comprised most of the countries in the Middle-East except Israel. In return, YAAS was to pay (1) an annual royalty and (2) a percentage of the cost of toys it bought from TRU. The initial term of the Agreements could be prolonged if YAAS opened additional stores. As will be seen below, the issues of when it opened stores and when and whether it could have opened others occupied many days of hearing.

PRIOR PROCEEDINGS

In December, 1993, pursuant to the arbitration clauses in the Agreements, TRU commenced this arbitration against YAAS, originally seeking a declaration that the Agreements would terminate, pursuant to a notice of termination, on December 31, 1993. YAAS counterclaimed for damages for breach of the Agreements.

The arbitration was brought in New York City before the American Arbitration Association under its Commercial Arbitration Rules[1]. The Agreements are governed by New York law. I was chosen and served as sole arbitrator.

In early 1994, the parties agreed to submit the issue of the alleged termination date of the Agreement to the arbitrator for a binding partial award. At a preliminary hearing in this matter, both parties agreed that the following question would be presented to the Arbitrator for binding partial award on a jointly agreed record:

> "Did the contract terminate on December 31, 1993, and if it did not terminate, when would it terminate?"

The parties submitted a joint record, consisting chiefly of the Agreements, the notices of termination and correspondence relating thereto. The issue was extensively briefed and the parties were heard on oral argument. The Partial Award,

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[1] These rules are referred to in this memorandum as the "Commercial Rules."

dated May 5, 1994, resolved the question presented for all purposes and for all further proceedings in this case. It was determined that the Agreements did not terminate on December 31, 1993 and had been automatically renewed until January 16, 1995. It was further determined that depending on the proof presented at the evidentiary hearings, the Agreements might have a longer term.

TRU did not press its original claim for declaratory relief and the case was reduced to YAAS's counterclaim for damages. 29 days of evidentiary hearings were held from November, 1994 through December, 1995. The record consists of more that 5,000 pages of testimony. The parties introduced several hundred documents for the record. After the conclusion of the evidentiary hearings, the parties submitted extensive briefs, reply briefs and proposed findings of fact and conclusions of law. On May 7, 1996, the parties were heard in oral argument.

Throughout these extensive proceedings both sides treated each other and the process with exemplary courtesy and professionalism. In many years of arbitration I have never seen a complex case more expertly presented. The advocacy displayed should be a model for what can go right in presenting a case in arbitration.

This memorandum is furnished at the request of both parties. It is designed to explain the factual and legal basis for the award. The factual issues were many and strongly contested. My findings of fact are based on my assessment of the credibility of the many witnesses who testified and the meaning and weight to be attached to the several hundred documents that the parties put into the record.

PRELIMINARY MATTER

Before proceeding to a discussion of the merits of this case, it is necessary to address an issue TRU has raised for the first time in its post-hearing briefs. I refer to TRU's contention that YAAS has not carried the burden of proof that its most recent store opening occurred on January 16, 1988. TRU argues that

its first notice of termination of July, 1992 was not late, and therefore that the Agreements terminated on January 31, 1993. TRU argues that consequently, YAAS's case completely fails. On oral argument TRU's counsel conceded that much soul searching had gone on before it had been decided to raise this argument. YAAS characterizes the new contention as "frivolous."

I find TRU's new argument untenable for several reasons.

First, after all the proof is in and the other side cannot contest it, I find it improper for TRU to raise this issue, which, if it were sound, (and it is not) would dispose of the case. Assertion of this matter amounts to assertion of a new claim, which, under Rule 8 of the Commercial Rules, TRU can make only with my consent. I think that to allow TRU to assert this argument for the first time in its closing briefs would border on misconduct of the arbitration and I cannot consent to it.

Second, once and for all, the Partial Award determined that the TRU's July, 1992 notice of termination was not timely. That determination has been made and cannot be reexamined. The parties jointly decided on the question to the arbitrator and upon the joint record, which both parties agreed was sufficient to make the binding determination. Both parties agreed that the determination was binding for all further proceedings in this arbitration. I accepted the submission on that basis.

The Partial Award determined that the Agreements did not terminate on December 31, 1993, and indeed had been automatically renewed until at least January 16, 1995. As the Partial Award makes clear, that determination was based on the findings that TRU's July, 1992 notice of termination was late and therefore ineffective. That conclusion was based in turn on the opening of YAAS's Al-Rihab store on January 16, 1988.

In all of the subsequent proceedings, there was never the slightest suggestion that there was any remaining question that the Al-Rihab store had not opened on January 16, 1988 or

that the Agreements did not continue after December 31, 1993.

Indeed, the argument TRU pressed in the Partial Award phase was not that its July, 1992 notice was *timely*, but that it was to be *disregarded* because it was supposedly based on TRU's own *incorrect* interpretation of the Agreements. TRU contended that its second termination notice of September 2, 1992 was based on the correct interpretation of the Agreements. In light of the positions TRU took in the Partial Award phase two years ago, it would be difficult to take this belated assertion seriously.

Third, if TRU were allowed to raise the issue at this time it would fail because the preponderance of the evidence in the record supports the YAAS position.

TRU has the burden of proof that its July, 1992 notice was timely[2]. It has failed to carry that burden. On the contrary, the evidence TRU itself cites in its brief is persuasive to me of the January 16, 1988 date.

Promptly after receiving TRU's July, 1992 notice, YAAS wrote a response to TRU which asserted that the Al-Rihab store had opened on January 16, 1988. That letter, an exhibit in the record, is itself uncontradicted proof of the January, 16, 1988 date. Moreover, Mr. Amin Kadrie, who wrote the letter, testified at the hearings that the Al-Rihab store opened in January, 1988. On cross examination by TRU, Mr. Kadrie stated that the January 16, 1988 date was correct. Mr. Kadrie's demeanor, which I observed, convinces me that on this point he was telling the truth, and was not hiding the fact that he knew that the store had opened on some later date. TRU conceded on oral argument that Mr. Kadrie was telling the truth.

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[2] TRU's contention that the burden is on YAAS because it alone had knowledge of the date of the store opening is factually wrong, as discussed below.

TRU's cross examination questions of Mr. Kadrie regarding the opening date of the Al-Rihab store were merely a foundation for the fact (undisputed) that no later stores were opened. This position is consistent with TRU's acceptance, during all of the evidentiary hearings, that the matter of the opening date had been settled in the Partial Award. Additionally, as noted above, in July, 1992, when TRU received Mr. Kadrie's letter asserting the January 16, 1988 date, it did not contest the date, which it could easily have done at that time. Instead, TRU accepted the date and proceeded to send its second, September, 1992 notice of termination based on its "calendar year" interpretation of the Agreements[3].

TRU notes that it has sales reports from the new store for the week ending January 22, 1988. However, the week ending January 22, 1988 has seven days, one of which is January 16. Those records and the YAAS business plan, which refers to a "mid-January" 1988 opening, are completely consistent with Mr. Kadrie's letter.

Also highly significant is TRU's failure to ask Ms. Amal Haddad any specific questions about the Al-Rihab store opening. In January, 1988, Ms. Haddad was YAAS's manager of toy operations. She presumably supervised the opening of the Al-Rihab store, if as seems likely, she did not actually open it herself. Ms. Haddad had left YAAS in March, 1994 and had been immediately hired by TRU to act as manager of its Mid-East toy operations. Ms. Haddad was working for TRU in Paramus, New Jersey throughout the hearings in this case. TRU had ample opportunity to ask Ms. Haddad, its own employee, anything it wished about the opening of the Al-Rihab store.

TRU even called Ms. Haddad as a witness. Although Ms. Haddad appears to have personal knowledge of the facts, TRU did not to put to her any specific questions about this

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[3] TRU's supposedly "correct" interpretation of the Agreements was not accepted in the Partial Award.

allegedly crucial point. She testified at length about other matters[4]. I would be required to draw the clear negative inference that TRU knows that Ms. Haddad had nothing helpful to say for TRU on this issue, and if asked questions, would have supported the January 16, 1988 date. Incredibly, TRU asserted in its brief and on oral argument, that knowledge about the opening of the Al-Rihab store is solely in the possession of YAAS. That assertion is flatly wrong.

Finally, the following excerpt from the transcript of the second evidentiary hearing on November 8, 1994, (at pages 364-364) settles the matter. Mr. Kadrie's direct examination has just concluded and cross examination by TRU has commenced.

> Q: [By Mr. Feldberg] Can we also agree, Mr. Kadrie that throughout [YAAS's] relationship with [TRU], up until this day, the only toy stores which YAAS opened are the four toy stores that were opened on or before January 16, 1988?
>
> A: January 16 -- that's correct.
>
> Q: So it would be fair to say that between January 16, 1988 and January 16, 1993, YAAS opened no new toy stores at all?
>
> A: We did not open any new toy stores, that's correct.
>
> THE ARBITRATOR: Without wishing to interfere with your examination, hasn't this all been decided, and don't we know that? Didn't I make a decision based on that as an established fact?

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[4] TRU did ask her about the "approximate" date of the opening of the Al-Rihab store. The question, which specifically did not inquire as to the exact date of the opening, was merely foundation for a line of questions to the effect the YAAS did not ask TRU for technical assistance at that time.

MR. FELDBERG: I am happy if your decision is --

THE ARBITRATOR: I thought that was the predicate of what we had a preliminary hearing about, that 1988 was the last time a store was opened.

MR. FELDBERG: Okay, I will move on.

MS. RICE: Just for a point of clarification, are you saying no new toy stores were opened after January 16, 1988?

MR. FELDBERG: Yes, I think that's what I said.

THE ARBITRATOR: I thought that was the date, and I thought -- I didn't think there was any factual dispute on that issue. If there is --

MR. FELDBERG: I want to make sure there isn't.

THE ARBITRATOR: Not only do I think there isn't, I don't think there can be at this point.

MR. FELDBERG: Good enough, I will move on to the next point.

This transcript demonstrates a number of things. First, Mr. Kadrie testified clearly and credibly that the January 16, 1988 date is "*correct.*" TRU might note that he was perhaps coached in this response by TRU's counsel, but since it is TRU which claims that there is no proof of the January 16, 1988 date in the record, it can hardly complain about Mr. Kadrie's answer. Second, the extract indicates that the Arbitrator had been led to conclude, on the second day of the hearings, that no factual issue about the date of the Al-Rihab store remained, and that the matter had been resolved in the Partial Award. TRU agreed with that view. Finally, the Arbitrator indicated that if there were a factual issue, TRU could raise it at that time. The invitation was not accepted by TRU, then or at any other time during the hearings. TRU had an opportunity on the second day of testimony to take up the issue it now raises, but it did not choose to do so.

For all of the foregoing reasons TRU's contention must be rejected.

THE ISSUES PRESENTED

In its closing argument, TRU clearly defined the issues for decision, which were the subjects of the extensive testimony and documents presented in the evidentiary hearings:

1. Did TRU breach the Agreements with YAAS?
2. If a breach occurred, did the breach cause YAAS damages?
3. If damages were suffered, what was their amount?

I agree with TRU's definition of the issues. The first two issues deal with liability. I find that the preponderance of the evidence compels affirmative answers to the first two questions. The third question is the amount of the damages and I find that a substantial recovery is the appropriate response.

THE AGREEMENTS

The Agreements and TRU's alleged breach of them are the heart of the liability case. The Agreements also figure prominently in the damage calculations. I accordingly set forth the important provisions which will be referred to in the discussion that follows.

The Agreements, signed in November, 1982, provide in part as follows (Section numbers are those of the L&T Agreements unless indicated otherwise):

YAAS entered into the Agreements because, among other things, TRU was:

> one of the largest retailers of toys and play things in the U.S.A. [with] wide experience and know-how in all aspects of the business including substantial experience in purchasing diverse inventory items in large quantities in the U.S.A. . . .(p. 1)

The Agreements define the "Territory" as:

> the countries presently known as Kingdom of Saudi Arabia, Kuwait, United Arab Emirates, Qatar, Oman, Bahrain, Yemen, Egypt, Sudan, Jordan, Lebanon, Syria, Iraq and Iran. (1.03)

The Agreements define a "YAAS toy Store" as:

> a retail store engaged primarily in selling TRU-type merchandise, owned or controlled by YAAS or an affiliate thereof or by any legal entity formed by YAAS or any partner or affiliate of YAAS and other third parties for the purpose of opening a toy store in any country of the territory. . .(1.08)

The Agreements also define an "affiliate":

> (i) if such person is a corporation, any person which has, directly or indirectly, control over the management and activities thereof, (ii) if such person is a partnership, any partner thereof, and (iii) any other person which, directly or indirectly, controls, is controlled by or is under common control with such person. "Control", with respect to any person, means possession, directly or indirectly, of the power to direct or cause the direction of the management of policies of such person, whether through the ownership of voting securities or by contract or otherwise. (1.01)

Under the L&T Agreement, TRU has an obligation to use its best efforts to make the YAAS toy Store business profitable:

> . . . TRU acknowledges that YAAS's decision to resort to TRU's services as hereunder set forth is predicated on the understanding that TRU will use its best efforts within its areas of responsibility under this Agreement to make the YAAS toy Store business profitable. (4.01)

The L&T Agreement further obligates TRU to

> render advice and assistance to YAAS . . . with a view toward helping YAAS realize success and profitability in its toy business in the territory. (3.02)

Under the L&T Agreement, TRU is obligated to provide to YAAS advice and assistance regarding any and all aspects of the toy retailing business:

> TRU shall provide YAAS during the term of this Agreement with technical advice and assistance pertaining to the establishment, maintenance, operation, development and expansion of YAAS toy stores in the Territory.
>
> TRU shall render advice and assistance to YAAS, initially and on a continuing basis at such times as YAAS reasonably requests during the term of this Agreement, with a view toward helping YAAS realize success and profitability in its toy business in the territory.
>
> Without limiting the generality of [the foregoing], TRU shall render advice to YAAS in the following areas: establishment of initial operating procedures and the revision thereof as changes develop in the art of toy trade and retailing or areas of policy within the territory; establishment or performance guidelines; management training; site planning and selection; office and warehouse procedures; merchandising; store layout and fixturing; marketing; advertising; sales promotion; inventory control and replenishment systems; cost and overhead control systems; cost data for capital goods, equipment and supplies; and methods of employee compensation and incentives.
>
> At the request of YAAS, TRU shall send to the territory at any time upon reasonable notice, for any reasonable length of time, such of TRU's qualified

> personnel as TRU deems necessary to render the technical advice and assistance required by YAAS. . . . (3.01-3.04)

The L&T Agreement also provides that YAAS has the right to use all TRU trademarks:

> TRU hereby grants to YAAS a license . . . to use the TRU-Trademarks . . . in the territory during the term of this Agreement. . . . YAAS shall be free, in its sole discretion, either to use any or all of the TRU-Trademarks. (2.01)

Under the L&T Agreement, TRU is obligated to provide its trademark rights and its technical advice and assistance to each and every YAAS toy Store in the Territory. (Articles 2 and 3.)

The L&T Agreement also contains an exclusivity provision prohibiting TRU from granting use of its trademark or providing advice and assistance to any party in the Territory other than YAAS:

> TRU agrees that, during the term of this Agreement, it will not enter into any other agreement with any person providing for the granting of trademark licenses or the furnishing of technical advice and assistance with respect to any toy store business in the territory. (7.01)

The Agreements contain "Term and Termination" provisions which allow YAAS to extend the term of the Agreements if it opens a YAAS toy Store every five or fewer years:

> This Agreement is effective as of November 16, 1982 and will remain in force for five (5) consecutive calendar years after the date of opening of the most recently opened YAAS toy Store in the territory; thereafter, the term of this Agreement will be automatically renewed for additional terms of two (2) consecutive calendar years each, unless either party shall give the other notice of its intention

> not to so renew not less than six (6) consecutive calendar months prior to the expiration of the initial or any renewed term then in effect. (8.01)

The Agreements contain an express prohibition against any oral modification or amendment.

Under the Agreements, TRU is not obligated to make any capital expenditures relating to the YAAS toy business. TRU receives its royalties and commissions under the Agreements whether or not the YAAS toy Stores are profitable. However, TRU is not entitled to any additional up-front payments or other additional franchise fees.

Under the L&T Agreement, YAAS is obligated to pay TRU a 3% royalty commission based on net sales. (5.01) Under the Supply Agreement, YAAS is obligated to pay TRU-HK a 5% purchasing commission based on TRU-HK's invoice price (3.01); YAAS also is obligated to order its requirements of toys from TRU-HK (2.01); TRU is prohibited from selling, distributing or consigning any merchandise to any person in the Territory except YAAS; and TRU is prohibited from engaging in any conduct that would make it likely that such merchandise would be sold in the Territory.

LIABILITY ISSUES

Overview of the Liability Issues

In summary, this case is straightforward. In 1982, TRU, for reasons that we must assume seemed advantageous at the time, bargained away to YAAS very substantial rights in the Territory[5]. In 1991, when a new management team at TRU, led by Mr. Bouts, looked at the situation, they concluded that the Agreements were not delivering to TRU the full potential of the Territory. It is clear from what ensued later, specifically, a "feeding frenzy" of organizations bidding for mere parts of the Territory, that the rights to all of the Territory,

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[5] The current leadership of TRU's International Division was not in place when the Agreements were negotiated and signed.

which under the Agreements belonged to YAAS, were very valuable. It is not necessary to find that TRU calculated the value of these rights at that time with mathematical precision to conclude that a businessman with Mr. Bouts' experience and credentials knew that YAAS's Agreements were blocking TRU from a gold mine.

TRU's explanation for what happened in 1991 and 1992 is that it believed that YAAS wanted to "change" the Agreements and was not interested in exploiting its rights in the Territory. TRU's position requires the conclusion that YAAS was either unaware of the substantial value of its rights, or knowing that its rights were valuable was prepared to simply abandon them. I find nothing credible in the record that would indicate such naivete on YAAS's part. On the contrary, as discussed below, I find that YAAS intended to and would have exploited its rights by opening toy stores within the Territory.

TRU contends that as a result of the proposals for expansion advanced by YAAS in September, 1991, the dissatisfaction voiced by YAAS with respect to its own performance under the Agreements, and the concepts set forth in a joint venture proposal put forth in February 1992, that its vice President, Mr. Larry Bouts, concluded that YAAS and TRU had agreed in principle to a change in the Agreements. Acceptance of TRU's contention would require me to give full credence to TRU's witnesses, particularly Mr. Larry Bouts and this I cannot do[6]. Mr. Bouts' demeanor coupled with my re-reading of the record of his examination persuades me that he was less than candid when he claimed that he believed that

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[6] Mr. Bouts testified for several days. I found him a reluctant witness. I found that his repeated professed inability to remember meetings, conversations or why various actions were taken was cumulatively not believable. For example, he professed inability to be sure of his own secretary's initials, not once, but on three separate occasions. I have accordingly relied only on so much of Mr. Bouts' testimony as I found credible.

YAAS was so interested in "changing" the Agreements[7] that it would apparently accept his offer to be considered a candidate to bid on the very substantial rights that it already owned.

Two other undisputed matters seem to me to have great significance. First, TRU has conceded that it had no grounds to terminate the Agreements for cause. Although it is possible to conclude, and it seems likely, that TRU was eagerly seeking cause for termination, no such cause was found and none was asserted in this arbitration.

Second, it is agreed that there is nothing in the record to suggest that TRU offered to buy YAAS out of its rights under the Agreements. Not only were there no negotiations with YAAS on this point, but nowhere in the enormous record is there any hint that buying YAAS out was ever considered or even discussed within the management of TRU. I asked both sides at the oral argument if there was anything in the record on the subject of a possible buy out and both sides told me that there was nothing.

From Mr. Bouts' own enthusiasm and Mr. Kadrie's eagerness to expand in the Territory, it must have been obvious to everyone that YAAS's rights were valuable. I have concluded that the record establishes that both YAAS and TRU knew in 1991, and thereafter, that YAAS's rights under the Agreements were valuable. The record as a whole leaves no doubt that YAAS was never prepared to simply abandon such valuable rights.

It is therefore not credible to me that a businessman of Mr. Bouts experience and talent could have believed or assumed that YAAS would simply walk away from those valuable

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[7] It is not necessary to decide whether TRU was unwilling to enter into the joint venture arrangements YAAS proposed in 1991-1992 because, as it claimed, TRU did not like joint venture agreements in the Mid-East or, because it wanted to terminate YAAS. As is discussed below, the record persuades me that YAAS wanted to proceed to exploit its rights to open stores in the Territory with or without a joint venture.

rights without a very substantial compensation. Mr. Bouts claimed that he did not finally decide on termination of the Agreements until Mr. Kadrie had made it clear in a letter of July, 1992 that YAAS would not agree to changing the existing agreements. I find that such assertions are not credible. Mr. Bouts had frequently characterized YAAS's rights as a "contractual constraint" to TRU's dealing with others in the Territory. The only "change" that could have interested Mr. Bouts would have been a renunciation of YAAS's exclusive rights in the Territory.

Without cause to terminate the Agreements and without any thought of buying YAAS out, TRU had only two options: 1) to perform its obligations under the Agreements enthusiastically in order to maximize its royalties and commissions from YAAS; or, 2) in order to reap huge up-front fees from others, to stall, stonewall and obstruct YAAS while the clock ran out and the Agreements ended under their termination clauses. The record as a whole leaves no doubt that TRU elected to pursue the second option.

Did TRU breach the Agreements?

I find that it did. It breached the Agreements when it sent the second non-renewal notice (dated September 2, 1992), which:

> direct[ed] YAAS to cease any efforts to open any new YAAS toys Store in the territory (as defined by the L&T Agreement), to otherwise perform fully its obligations under the Agreements and to provide [TRU and TRU (HK)] with all amounts past due and all reports and documents supporting YAAS's computation of amounts due.

Reserving its other legal remedies, TRU then expressly threatened that YAAS's failure to heed its instructions not to open a store could constitute grounds for an immediate termination for cause.

It has previously been determined in the Partial Award that

> "[T]he effect of a notice of intention not to renew is not itself termination. It is merely the prevention of an otherwise automatic renewal. The giving of such a notice [of termination] cannot itself affect any rights the parties then have under the Agreement. One of the rights YAAS has under the Agreement is the right to open stores."

TRU characterizes its action thus:

> "YAAS has offered nothing to show that these letters were anything other than what they appear to be on their face, *i.e.*, good faith efforts to exercise TRU's non-renewal rights under the Agreements.
>
> "YAAS focuses principally on the direction in TRU's September 2, 1992 non-renewal notice that YAAS cease any efforts to open new stores. While the Agreements did not explicitly give TRU the right to direct YAAS to cease any efforts to open a new store, the L&T Agreement did provide that the advice and assistance TRU was required to provide be "with a view toward helping YAAS realize success and profitability in its toy business in the territory." Fairly read, the September 2, 1992 direction was not a breach, but merely a statement of the obvious -- YAAS should not open a new store which could not possibly help YAAS realize success and profitability in its toy business because (a) YAAS's toy business was not successful or profitable, and (b) TRU then believed YAAS's toy business would end in sixteen months." (TRU Memorandum at page 24).

TRU's argument is unpersuasive. The Agreements in no way authorize TRU to forbid YAAS to open toy stores. YAAS had the right, until the last day of the term of the Agreements, to open toy stores and by so opening toy stores to extend the term of the Agreements. TRU's unauthorized direction, which amounted to a repudiation of TRU's obligation to assist YAAS to open stores, made it impossible or

extremely difficult for YAAS to expand. Outside of Kuwait, in the face of this direction, it would not have been possible for YAAS to enter into serious discussions with others, let alone conclude agreements with third parties[8]. Under these circumstances, it is hard for me to imagine a serious partner willing to run the risk of litigation to join forces with YAAS in launching a toy store. Within Kuwait, even without a partner, YAAS would have had to run a litigation risk even to commit its own capital.

Thus, on September 1, 1992 YAAS had the right to open an indefinite number of toy stores in the Territory. On September 2, 1992 those rights were essentially vitiated. It is that simple. That is a breach and I so find.

YAAS has introduced abundant credible testimony and documentary evidence to show that TRU had been breaching the Agreements since early 1991. In the main, YAAS's evidence is persuasive that since that time TRU had been primarily interested in eliminating YAAS in order to have a free-hand in the Territory[9]. It is not possible for me to conclude on this record that TRU performed its obligation to use its best efforts to assist YAAS to open stores and to maximize YAAS's profits. Apart from merchandising toys for YAAS and supplying toys, it is hard for me to find anything significant that TRU did to further YAAS's interests.

Since the Agreements had been extended until at least January 16, 1995, TRU breached the Agreements in 1993 when, it negotiated and entered into two separate franchise agreements with others for toy stores in the Territory. It does not seem necessary, however, to recite these matters in detail,

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[8] In most of the countries in the Territory, a foreign party, such as YAAS, must have a domestic partner to do business. YAAS was free to operate in Kuwait and also in the United Arab Emirates, where it had a local subsidiary.

[9] An internal memorandum of TRU dated April, 1991 states that Larry wanted to get out of the [YAAS] Agreements and had consulted counsel about it.

because YAAS calculates its damages from September 2, 1992 and does not assign any particular damages to events before that date.

Did TRU's Breach of the Agreements Cause YAAS Damages?

The breach plainly caused YAAS damages. It cannot be seriously claimed that the rights TRU canceled were not valuable because subsequently, it sold a small part of those rights for many millions of dollars. Similarly, it is not necessary to demonstrate that the new agreements TRU entered into with others are in every respect identical to the Agreements with YAAS. I find that the rights granted under the new agreements are sufficiently similar to those granted to YAAS under the Agreements to conclude that in effect, TRU sold to others what it had previously sold to YAAS.

Could YAAS have opened a toy store before January 16, 1993?

TRU contends that YAAS could not have, that the "initial term" of the Agreements would expire and under the ruling of the Partial Award the Agreements would expire on January 16, 1995.

A great portion of the testimony presented concerned this issue, YAAS contending that it was ready, willing and able to open a store, and TRU arguing that for a variety of reasons it would have been absolutely impossible for such a store to have opened. The record as a whole persuades me that YAAS has the better of the argument.

TRU attaches great significance to the concept of a "conforming" toy store. It argues that TRU has developed a toy store concept that is part of its demonstrated world-wide success, and that currently, all new toy stores must conform to fixed criteria relating to everything from location to size, from parking availability to store layout and from the mix and display of merchandise to accounting and computer matters. TRU's witnesses were knowledgeable and believable on these current criteria.

TRU draws the conclusion that since it would have been difficult or impossible for YAAS to have met these standards at the best of times, it was completely impossible in the situation YAAS was in on September 2, 1992. TRU concludes that YAAS did not carry the burden of proof that it could have opened a store before the initial period expired once and for all on January 16, 1993.

However, TRU overlooks several factors that convince me that YAAS could indeed have opened a store within that time frame. First, the Agreements were written and signed in 1982. I am not persuaded that the stores contemplated in the Agreements in 1982 were what TRU currently characterizes as "conforming" stores. Moreover, the whole course of dealing between TRU and YAAS over the period from 1982 to 1992 shows that TRU did not care at all about the size, shape or location of YAAS's toy stores. The whole controversy about the opening date of the Al-Rihab store, discussed above, is bottomed on TRU's ignorance of even when that store opened, let alone where it was or what it looked like. TRU had abandoned YAAS to practical autonomy regarding toy stores in the Territory. TRU was being compensated under the Agreements by royalties and commissions, payable whether or not YAAS's toy stores were profitable. Given this background, I find that TRU's insistence, after it had given notice of termination, on holding YAAS to its current standards for "conforming" stores is a mere pretext to make it impossible for YAAS to fulfill the condition for extension of the initial term.

Could YAAS have opened a toy store between September 2, 1992 and January 16, 1993? I find that it could have.

YAAS is a large well-financed organization. At the time in question it owned substantial real estate in Kuwait and by leasing could have had access to other real estate. One of its affiliates was a large construction firm. Given that the rights YAAS had were so valuable and that to extend the initial term for five more years required merely the opening of a single toy store, I find that YAAS could and would have mustered

sufficient capital and manpower to accomplish this relatively modest task.

The record, moreover, persuades me that YAAS actively wanted to expand its toy operations and had taken a number of concrete steps in that direction by the time TRU sent its first (July, 1992) non-renewal notice.

Upon assuming direction of YAAS's toy business in 1989, Mr. Kadrie became involved in an extensive review of the profitability of the YAAS toy business and the feasibility of expanding the business outside of Kuwait. As part of his review of the toy business, Mr. Kadrie requested a visit from TRU's experts but none occurred. Mr. Kadrie testified that after his review, he was firmly convinced that YAAS should remain in the toy business and that expanding the business on a regional basis was a "very significant opportunity" for YAAS. YAAS successfully implemented a new pricing strategy. The implementation of which resulted in sales increases in all categories and a 45% increase in sales during Eid of 1990. Prior to the Gulf War, YAAS expected to close 1990 at 30% over the prior year.

On August 2, 1990, Iraq invaded Kuwait. Kuwait sustained major damage during the invasion and occupation: all communications were cut off; the port was closed and mined; major hotels and U.S. commercial establishments were targeted for bombing raids by the Iraqis; and the oil well fires lasted well into November 1991, more than one year after the invasion.

Alghanim' toy and other businesses also sustained major damage: Alghanim's total employee count fell from 4,000 to 29; one of its toy stores was burned to the ground; other stores suffered fire and other damage; tens of millions of dollars of inventory and equipment were destroyed; and several of the stores were looted by the Iraqis. Only one YAAS toy store survived the invasion mostly intact.

In the post-invasion period, Mr. Kadrie had full authority to make any and all decisions regarding the toy business. Mr.

Kadrie notified Ms. Haddad in April 1991 of YAAS's commitment to remain in the toy business. Ms. Haddad had been kept on its payroll throughout the invasion of Kuwait in order to permit YAAS to resume its toy business when the war ended. Mr. Kadrie advised TRU that it was YAAS's intention in the post-invasion period to reconstruct the toy business.

In the spring of 1991, the Salmiya YAAS toy Store was reopened, and Ms. Haddad was given the task of securing merchandise for that store. In late May or early June 1991, YAAS began implementation of its plan to expand in the region and to open new stores in Kuwait. Ms. Haddad investigated sites for additional stores in Kuwait. Ms. Haddad notified Kadrie, in June, 1991, that there were a number of premier retail spaces vacant -- which had not sustained major damage during the occupation and which required only minor refurbishment, addition of shelving and inventory -- that were immediately available for additional YAAS toy Stores.

Throughout the summer of 1991, Ms. Haddad also conducted an investigation into the costs associated with opening YAAS toy Stores in the U.A.E. She requested financial and market information from and entered into discussions with Almaya (U.K.) Limited, a potential partner in the U.A.E. Almaya determined that, based upon YAAS's store specifications, two toy stores could be opened within five or six months, or by January 1992.

On September 5, 1991, Mr. Kadrie and Ms. Haddad met with various executives of TRU. YAAS's intent to expand the toy business and its belief that the Territory could support 15 to 20 stores was discussed. Mr. Kadrie further informed TRU that YAAS was interested not only in expanding its toy business but in expanding its other businesses in the region[10]. YAAS also agreed to submit a business proposal to TRU outlining YAAS's regional expansion plan which would contain

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[10] YAAS's affiliates are leading Mid-East distributors of well known brand-name products including air-conditioners and General Motors automotive products.

demographic and market information that TRU had requested at the meeting.

In fall of 1991, YAAS commissioned two firms to research and compile demographic and market information as well as market data pertaining to the number, sizes and types of toy operations already in existence in various countries in the Middle East. That analysis took roughly two months to prepare. At the same time, Ms. Haddad prepared the YAAS 1992 business plan. The 1992 plan, which was approved by the YAAS Executive Committee, stated that YAAS planned to open a toy store in one of two sites in Kuwait City by January 1993.

On February 24, 1992, YAAS and TRU met in Paramus, New Jersey. At that, meeting, Mr. Kadrie presented to Mr. Bouts and other TRU executives a written business proposal, in addition to a summary of the market data requested by TRU. Mr. Kadrie said that YAAS intended to open YAAS toy Stores throughout the Middle East and recommended a joint venture relationship between TRU and YAAS as one method of accomplishing that expansion.

Mr. Kadrie further proposed a regional store opening in May 1993 in the event that TRU and YAAS consummated a joint venture agreement. Mr. Kadrie told TRU that although it would be willing to discuss with TRU alternative vehicles for pursuing a regional expansion plan, YAAS intended to proceed with its expansion plan *with or without TRU's cooperation* because the "expansion of the toy business was a critical part of [YAAS's] overall corporate strategy."

In March 1992, Ms. Haddad commenced an investigation of potential sites in Saudi Arabia and the U.A.E. for YAAS toy Stores. For Saudi Arabia, Ms. Haddad obtained rental cost information relating to the opening of 2000 square meter free standing facilities with parking lots in high traffic areas in Jeddah and Riyadh. For the U.A.E., Ms. Haddad obtained similar rental information for stores in Abu Dhabi and Dubai.

On April 3, 1992, YAAS prepared a cash flow analysis with respect to the cost of potential sites in Saudi Arabia and the U.A.E. That analysis reconfirmed Mr. Kadrie's expectation that the regional expansion of the toy business would be very profitable.

In March 1992, Mr. Kadrie determined that a necessary component of the regional expansion program was the reestablishment of the flagship YAAS toy Store at Farwaniya, which had been burned to the ground during the Iraqi invasion. In May 1992 Mr. Kadrie asked Ms. Haddad and J. Mohan, the financial controller at YAAS, to determine what it would cost to rebuild and reopen the Farwaniya store. In July 1992, Ms. Haddad and Mr. Mohan prepared a proposal for the Farwaniya store, which projected that the rebuilding would cost approximately 61,000 Kuwaiti dinars. Because YAAS already had the necessary shelving, signage and inventory, the Farwaniya YAAS toy Store could have been opened by December 1, 1992, or approximately three and half months after the project commenced[11]. The business proposal for the Farwaniya store was agreed to by the top management of YAAS.

On July 12, 1992, Mr. Kadrie notified TRU that YAAS intended to pursue its "immediate plans and priorities" -- which included a plan to open stores in at least one more country. Mr. Kadrie further informed TRU that YAAS would defer agreement related issues because YAAS did not want to lose time which would be better spent pursuing its expansion plans.

The foregoing matters are credibly established by the record. If YAAS had the cooperation from TRU that it was entitled to under the Agreements, I am convinced that it could and would have opened toy stores not only in Kuwait, but in other

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[11] YAAS's plans to open this store are clear evidence, in mid-1992, of YAAS's intention to expand its toy business, whether it would have been an "opening" for purposes of extending the term of the Agreements, or was merely a "re-opening" that would not have had that effect, as TRU contends.

countries in the territory. YAAS would have done this for its own business reasons and only incidently to extend the terms of the Agreements. TRU dismisses the foregoing matters as not sufficiently concrete. I find, on the contrary, that given the setback to its plans caused by the Iraqi invasion, YAAS has demonstrated that it was proceeding in a businesslike fashion, first to rebuild, and then to expand, its toy operations. However, expansion by YAAS was diametrically opposite to TRU's strategy.

The Agreements require TRU to provide its best efforts to assist YAAS to open toy stores. In the face of the provisions of TRU's September 2, 1992 non-renewal notice that ordered YAAS not to open stores at all, it is plain that no such best efforts from TRU would have been forthcoming.

I therefore find that YAAS would have opened a toy store in the Territory before January 16, 1993 but for TRU's breach. Equity compels extension of the initial term of the Agreements for an additional five years.

YAAS argues that the initial term of the Agreements should be extended under the force majeure clause of the Agreements for an additional period because of the Gulf War, which severely impacted YAAS's toy business, located as it was in Kuwait City. It is undoubtedly true that the Iraqi invasion of Kuwait City, the burning and looting of YAAS's toy stores, the furloughing of most of its employees and other disruptions could be called the mother of all forces majeures. However, because I have already determined that YAAS was ready, willing and able to open a toy store and would have done so, it is not necessary to decide what effect the act of force majeure had on the renewal terms of the Agreements.

DAMAGE ISSUES

Having found that TRU breached the Agreements and caused damage to YAAS, it is now necessary to determine the amount of those damages. YAAS has not sought declaratory or injunctive relief and is seeking only a money equivalent of the benefit of the bargain that TRU's breach has removed.

YAAS has chosen to base its claim for damages on a theory of lost opportunity. In essence, it claims that the bundle of rights it owned under the Agreements would have allowed it to generate a cash flow during the term of the Agreements, that the flow can be estimated with reasonable certainty and that TRU's breach has deprived YAAS of that cash flow or the right to sell it to others. On all these points I find that YAAS has carried its burden of proof.

The task of estimating these damages with reasonable certainly is rendered much less daunting by two important occurrences that are amply proved in the record.

The first is that TRU actually sold the rights to countries in the Territory to others during the term of the YAAS Agreements. The terms of those sales, including the bidding process and the very substantial fees TRU was able to charge, are not disputed.

Second, TRU's Vice President, Mr. Van Beek caused an elaborate spreadsheet of projections and assumptions about what could be realized in the Territory to be prepared. This schedule, which was known as Exhibit 1015 in the hearings, figured prominently in the testimony. As discussed below, I find that Exhibit 1015 is reliable.

I have concluded that the YAAS's rights under the Agreements were substantially the same as the rights which TRU provided in part to its new franchises, ATA and Al-Futtaim. It is therefore fair to use the amounts those entities thought their territories were worth in assessing the value of what YAAS was deprived of. In addition, under the Agreements, YAAS had the ability to provide its rights to joint venture partners for the purpose of opening toy stores in the Territory or to sell its rights to others. Thus, in valuing YAAS's lost opportunity resulting from TRU's breach of contract, it is proper to consider the values attributed to the new franchise agreements.

The proper date upon which to calculate damages to YAAS must be determined from the date of breach. YAAS's expert, Robert Sherwin, prepared an expert report and offered

testimony evaluating the damages suffered by YAAS as a result of TRU's breach of the Agreements. I found that Mr. Sherwin's report and testimony were credible in the main and that I can place reliance on his report and testimony in fashioning the award that I have determined is the fair outcome of this case.

Mr. Sherwin was qualified to offer an expert opinion on damages based upon his educational background and professional experience. Mr. Sherwin's opinion was based upon his experience as an economist, documents provided by the parties during discovery and/or marked as exhibits at the arbitration, information regarding maximum foreign ownership requirements for selected countries in the Territory and the testimony of witnesses during the arbitration. I find that all of these afford a firm and reliable foundation for his opinion.

YAAS asserts that in evaluating the effects of the breach, Mr. Sherwin incorporated the following assumptions into his analysis, all of which I find are supported by the record:

> a: YAAS could extend its contract with TRU by opening a store within the Territory and that each time YAAS opened a store, the contract would be extended for a five-year period[12]. YAAS has persuaded me that it could and would have done this if it were not for TRU's breach.
>
> b: YAAS had the right to the expertise and the experience that TRU possessed with respect to the establishment, maintenance, operation, development, and expansion of toy stores in the area. This is plain from the face of the Agreements.
>
> c: With the exception of the up-front fees, the economics to TRU of the Agreements with YAAS were substantially the same as the economics of the

[12] The "initial term" of the Agreements has been extended, as decided above.

> franchise agreements with ATA and Al-Futtaim, *i.e.* TRU was to receive a 5% purchasing fee (on purchases of merchandise from TRU) and a 3% royalty fee (on store sales) in either case.

Mr. Sherwin performed two alternative calculations of YAAS's damages that may be called, respectively, the "Cash Flow Analysis" and the "Franchise Fee Analysis."

For the Cash Flow Analysis, Mr. Sherwin performed a damage calculation to measure what YAAS would have earned if, in the absence of TRU's breach, YAAS had been able to continue its operations in Kuwait, to expand those operations, and to develop retail toy operations in other countries in the Territory, either directly or in joint venture with qualified local companies in those countries.

In making his calculations, Mr. Sherwin performed a typical valuation exercise. He prepared a store opening schedule depicting when and how many stores would be opened in eight of the 14 countries in YAAS's Territory. He then performed a cash flow analysis based on the store opening schedule to ascertain the expected profits from the toy store operations in each country. Finally, Mr. Sherwin determined an appropriate discount rate and applied it to the cash flows to arrive at their present value.

Mr. Sherwin based his cash flow projections on Exhibit 1015. This exhibit, as noted above, prepared by Mr. Van Beek, a Vice President of TRU, was used by TRU to negotiate the up-front franchise fees to be paid by prospective purchasers and to calculate the royalty and purchasing commissions TRU would receive over the life of the franchises. I find that Exhibit 1015 is reliable. In concluding two substantial sales TRU itself used Exhibit 1015 for pricing purposes. It is therefore an inherently reliable document and contains inherently reliable information for purposes of calculating an income stream from new stores in the Territory with reasonable certainty. I find that Mr. Sherwin's reliance on Exhibit 1015 resulted in a cash flow projection for the Territory which is reasonably certain.

To perform the first step of his Cash Flow Analysis, Mr. Sherwin prepared a store opening schedule, which is reflected in Exhibit 202. Mr. Sherwin's store opening schedule is substantially similar to the store opening schedule contained in Exhibit 1015, with three modifications. First, because YAAS already had a store in Kuwait and had, prepared to open a second store there, Mr. Sherwin began his analysis with two stores in Kuwait in 1993. Second, with respect to Saudi Arabia, Mr. Sherwin stretched out the store openings to be consistent with the assumption that YAAS's operating rights would continue for five years after the last store opening. Otherwise, the total number of stores for Saudi Arabia would have been the same in the YAAS schedule as in the TRU schedule.

Mr. Sherwin explained that the effect of this change in the store opening schedule was to reduce the cash flow projection in Exhibit 1015 for toy stores in Saudi Arabia. The final modification was the addition of Egypt and Jordan to YAAS's store opening schedule. These countries were added because Exhibit 1015 was limited to the countries covered by the two franchise arrangements that TRU entered into in December 1993. Thus, Exhibit 1015 did not include all of the countries in the Territory in which YAAS had the right to open toy stores. Mr. Sherwin credibly testified that the addition of Egypt and Jordan to YAAS's store opening schedule conservatively established a value for the remainder of the Territory beyond the countries referenced in Exhibit 1015 by assigning a value to just two of the remaining eight countries.

I find that Mr. Sherwin's store opening schedule set forth in Exhibit 202 is a reasonable projection of the stores that would have been opened in order to accomplish YAAS's expansion in the Territory.

In preparing his Cash Flow Analysis, Mr. Sherwin testified that he used the store opening schedule in Exhibit 202 and applied the relevant parameters as to sales, cost, royalties and investments contained in Exhibit 1015. Mr. Sherwin prepared six different cash flow analyses for each country based on the

"good," "better" and "best" scenarios found in Exhibit 1015. Based on TRU documents, Mr. Sherwin applied merchandise margins of 35% and 40%.

Mr. Sherwin testified that he selected the "better" scenario from Exhibit 1015 because that scenario represented the average cash flows. He further testified that to be conservative he applied the 35% merchandise margin. Mr. Sherwin's cash flow projections for countries in the Territory in which YAAS had the exclusive right to open toy stores are based upon TRU's historical international performance as well as actual cost factors for countries in the Territory. I find that the projections are a reasonably accurate reflection of the expected cash flows for the countries in the Territory.

Mr. Sherwin testified that in order to determine the present value of the future cash flows he applied a 9% discount rate to the net cash flows. To derive the 9% discount rate, Mr. Sherwin used the Capital Asset Pricing Model ("CAPM"). He explained the derivation of this discount rate and I find his analysis persuasive.

Mr. Sherwin's alternative "Franchise Fee Analysis" assumes that instead of operating toy stores to the extent possible in the Territory, YAAS could have chosen to sell its rights to future cash flows in exchange for up-front fees. Although the record abundantly establishes that YAAS was prepared to expand into the Territory on an operating basis, the Franchise Fee Analysis which assumes that YAAS would sell its rights to the income stream has much to recommend it.

In brief, the Cash Flow Analysis requires the assumption that the stores are opened and operated on schedule during a ten year period and actually generate for YAAS the cash flows the breach has prevented it from realizing. TRU correctly notes that this result depends on a long series of assumptions, a series that it contends is so long that such damages must be considered speculative and hence not recoverable. By choosing up-front fees, YAAS would in effect shift all of the future risk of realizing these cash flows to the buyers.

It is not necessary to agree with TRU to conclude that the Franchise Fee Analysis is based on much more conservative assumptions. It assumes that willing third parties would have independently evaluated the projected income streams from the point of view of 1993, as reflected in Exhibit 1015, and would have priced their expectations at that time in the same manner as the two organizations with which TRU actually concluded sales. This assumption, which I find reasonable, looks to the question what would a willing third party have paid YAAS for these rights at the time of the breach?

The future risks to the income stream may still have been present. However, it is not disputed that independent third parties were willing, at that time, to calculate their own discount of those risks, and in arms length bargaining, to agree to pay substantial prices for the projected cash flows. TRU accepted those prices. I find that this alternative, while it may well be less than fair to YAAS in not fully reflecting what it could have achieved, is firmly rooted in documented past events. I believe it is the preferable basis for damages in this case, and I so find.

In calculating damages on this basis Mr. Sherwin testified that it is reasonable to assume that YAAS would have been able to sell its rights for at least the same amount that TRU was able to negotiate as up-front fees since, under the Agreements, YAAS could deliver to its partners the same bundle of rights that TRU sold to its franchisees. As noted above, I have accepted this assumption.

Mr. Sherwin testified that he considered two alternatives in the Franchise Fee Analysis. Under the first alternative, he assumed that YAAS would sell all of its rights to participate in the income stream of toy stores in Saudi Arabia, the U.A.E., Bahrain, Qatar, Oman -- the countries covered by TRU's franchise agreements with ATA and Al-Futtaim -- for the franchise fees the franchisees paid or agreed to pay to TRU at the end of 1993.

Under the second alternative, Mr. Sherwin testified that he assumed that YAAS would sell all of its rights to participate

in the income stream of toy stores in Saudi Arabia, the U.A.E., Bahrain, Qatar and Oman, but retain its rights to open such stores in Kuwait. Mr. Sherwin thus assumed that YAAS would not receive a franchise fee for Kuwait but instead would receive the projected cash flows from the toy operations in that country.

I find that the record establishes that YAAS intended to continue the toy business in Kuwait absent TRU's breach. Accordingly, I find that the second alternative represents the best approximation of YAAS's damages.

The ATA and Al-Futtaim agreements did not include all the countries in the Territory in which YAAS had the right to open toy stores. YAAS had the right to sell to others 100% of income streams of toy stores in the eight remaining countries in the Territory and it is appropriate to take the value of those rights into account.

To do this Mr. Sherwin first looked to the franchise agreements with ATA and Al-Futtaim to determine the franchise fees which ATA and Al-Futtaim agreed to pay TRU at the end of 1993 for six of the 14 countries in YAAS's Territory. Mr. Sherwin determined that, like the venture partners to which TRU sold the franchise rights in certain countries of YAAS's Territory, YAAS's partners in the remaining countries similarly would be willing to pay up-front payments in exchange for 100% of the cash flows. I find that this assumption is reasonable.

If YAAS had sold 100% of the cash flows in Egypt and Jordan for 100% of the franchise fees, according to Mr. Sherwin's analysis, it would have received $9.45 million (as described in the part of his report designated as Ex. 201). I find that the addition of the franchise fees for Egypt and Jordan establishes a value for the franchise rights to which YAAS

was entitled in the remainder of the Territory beyond those countries included in the ATA and Al-Futtaim agreements[13].

Mr. Sherwin determined that a 7% discount rate was the appropriate rate to estimate the present value of the franchise fees paid or to be paid to TRU. I find that this rate is reasonable because several TRU documents, including Exhibit 1015, used a 7% discount rate to estimate the present value of the up-front fees in royalty and purchasing commissions to be paid to TRU over the life of the franchises. In addition, Mr. Sherwin credibly testified that because the franchise fees, being up-front payments, were not contingent on future profits or sales and thus entailed less risk to YAAS, a lesser discount rate than the 9% rate he testified was appropriate for cash flows should be used for the franchise fees.

TRU argues that the YAAS analysis should be disregarded because it assumes the existence of 51% joint venture partners and potential franchisees in various countries. TRU claims that YAAS has not shown that any other company in the Territory was willing to enter into such a venture. I am persuaded, however, that YAAS would have been able to secure joint venture partners and franchisees if TRU had carried out the Agreements and provided YAAS with what would have made such a venture valuable to a third party. Given the "feeding frenzy" to open toy stores in the region, I find that YAAS would have had no difficulty in finding suitable partners.

TRU argues that Section 7.04 of the Agreements provides that countries are to be deleted from the Territory if TRU receives "bona fide offers" from potential partners, refers such

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[13] Mr. Sherwin based his Egypt store opening assumption upon a number of different forecasts in TRU documents -- which ranged from two to ten store openings (Exs. 84, 129, 130, 139, 185) -- and upon YAAS's February 1992 presentation to TRU. Mr. Sherwin based his Jordan store opening assumption on TRU documents which forecasted the opening of two stores in Jordan and/or Lebanon. I find that these assumptions are reasonable.

"offers" to YAAS and if YAAS does not then open a store in that country within "two (2) years from the date such "offer" is referred to YAAS. TRU claims to have received and referred to YAAS dozens and dozens of such "offers."

Inspection of the so-called "offers" reveals that they are mere expressions of interest. There is not a single one, including one from interests connected with the royal family of Saudi Arabia, that rises to the level of an offer that could have been accepted such that a contract would then have been created. I construe the term "bona fide offer" in Section 7.04 to have its ordinary meaning: a bona fide offer is an offer than can be accepted to create a contract. I find that the Agreements contemplate that countries can be deleted only if a present contractual opportunity is declined by YAAS, which would be evidence of its intent to abandon a country. Since no such opportunities were presented, no such abandonment occurred.

To rebut the specifics of Mr. Sherwin's damage calculation, TRU offered the testimony of Mr. Much and an expert report prepared by him (Ex. 1044A). Mr. Much was said to be giving a "critique" of Mr. Sherwin's analysis.

Mr. Much criticized Mr. Sherwin for relying on Exhibit 1015 instead of TRU International's historical performance outside of the Territory. TRU provided Mr. Much with a document, Exhibit 184, which was prepared by TRU in March 1995 at Mr. Much's request, to reflect the historical performance in terms of costs and sales per store of TRU's International Division for the years 1989 through 1993. Mr. Much testified that he based his critique on Exhibit 184.

However, Mr. Much testified that he did not know whether Exhibit 184 included all the stores in TRU's International Division. Additionally, TRU operates on a fiscal year, but Mr. Much did not know whether or not TRU operated on a fiscal year. Mr. Much did not review TRU's annual reports and could not personally verify the accuracy of the data provided

to him by TRU in Exhibit 184[14]. He did not know if Exhibit 184 reflected fiscal year or calendar year results. TRU's 1993 annual report reflected average sales per store for the International Division of $9.4 million. In his critique, Mr. Much ignored this historical international sales information reflected in TRU's annual reports and Exhibit 184 and instead selected the lowest median per store sales number reflected in Exhibit 1015. Mr. Much testified that it is important in valuation analyses to recognize that there is an inverse relationship between sales levels and merchandise margins, *i.e.*, lower sales figures should be coupled with higher merchandise margins. However, he did not recognize this principle in performing his critique and did not account for merchandise margins as coupled with reported per store sales.

In his critique, Mr. Much did not attribute any value to those countries in the Territory not covered by the ATA and Al-Futtaim agreements, although rights in those countries plainly had value. Although he purported to offer a critique of Mr. Sherwin's report, Mr. Much selected a different and substantially earlier date than that used by Mr. Sherwin to calculate the discount for putting cash flows on a present value basis, and thus evaluated a different time period than Mr. Sherwin. For these reasons, I was not persuaded that Mr. Much's views were reliable and I can give them but little weight.

TRU also challenged the discount rate Mr. Sherwin used to calculate the present value (for damage purposes) of the various cash flows. Originally, TRU designated only Mr. Much as its damage expert. After Mr. Sherwin testified, TRU asked for permission to offer an additional expert witness on the subject of discount rates. This application was strenuously resisted by YAAS. I decided that the issue was sufficiently important that

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[14] It is not disputed that Exhibit 184 was prepared by TRU for Mr. Much's use. It is also not disputed that the figures in Exhibit 184 are accurate extracts from TRU's books. The parties disagree about the completeness of the information given to Mr. Much.

I should have the benefit of all information the parties wished to submit. I therefore allowed TRU to present the expert report and testimony of its additional expert, Dr. Enrique Arzac.

Dr. Arzac took strong issue with the discount rate used by Mr. Sherwin. He asserted on direct examination, on the basis of a number of factors that a 31% discount rate would be appropriate as opposed to the 9% Mr. Sherwin had used. However, Dr. Arzac had a bad afternoon on cross-examination. He was forced to admit that one after another of his assumptions were wrong, and even that his calculations were faulty. By the close of the day, he had admitted that his original 31% discount rate had shrunk to 14%[15]. I was not persuaded by Dr. Arzac's testimony. I find that Dr. Arzac's report, riddled as it is with admitted errors and incorrect assumptions, is so untrustworthy that I cannot give it any weight. Mr. Sherwin's discount rate was not credibly contradicted and I believe it should be accepted.

TRU places considerable reliance on *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261, 502 N.Y.S.2d 131, 132 (1986) in which the Court of Appeals of the State of New York stated that

> "if it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty."

TRU argues that since YAAS had only a slender track record in the toy business, the Kenford case teaches that its future profits would be speculative and thus not recoverable.

I do not think the Kenford case rules out damages in this case. Kenford disallowed damages based on future profits from concessions in a domed stadium that was never built.

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[15] Even that rate was successfully refuted by Mr. Sherwin on rebuttal.

Because at the time of the breach only one other such facility was in operation, the damages necessarily had to based entirely on estimates of attendance and use of concessions at sporting and other events 20 years into the future. In this case YAAS, which is forced into the estimating posture because of TRU's breach, bases its damages not on its own experience but on TRU's. TRU has hundreds of toy stores worldwide. Since it has been found that the Agreements require TRU to provide a wide variety of services, similar to what it provides its own toy stores, I find that YAAS's method of estimating damages is reasonable and believable, and provides a sound basis on which to fashion the award.

Similarly, *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 333-34 (2d Cir. 1993) seems to me to be inapposite. In that case the expert assumed an "abrupt expansion" in the market for a new product. In this case the product, toys, is not new, the market is chiefly a matter of demographics, and the track record of TRU is well established.

TRU argues that its actual experience in the Mid-East shows that fewer stores than originally planned can be opened. The agreements into which TRU actually entered into with ATA and Al-Futtaim originally required only nine stores in the United Arab Emirates and seven stores in Saudi Arabia. TRU notes that the ATA agreement was subsequently amended to decrease the number of required store openings in Saudi Arabia to five, a fact that TRU claims is reflective of the recessionary financial climate in Saudi Arabia. TRU further claims that both agreements originally contemplated that a total of ten stores would be opened by December 31, 1995, but that an amendment to the ATA agreement decreased that total to five stores. TRU asserts that its actual performance in the Middle East, in which only one store has actually opened and only five more are projected, is an indicator that YAAS could not have met the store opening schedule of Exhibit 1015.

YAAS's damages are to be calculated as of September 2, 1992 and are based on what its rights were worth at that time.

More important, since the start of this case in late 1993 it has been clear that large stakes are involved and that TRU's actual results of operations in the Middle East could have a bearing on this case. The record does not provide a sufficient basis to disentangle TRU's actual results, which TRU could have influenced for purposes of this case, from what might have been the business results of TRU's Mid-East venture if this case had never existed.

For all of the foregoing reasons, I find that Mr. Sherwin's damage calculation based on the Franchise Fee Analysis is a reasonably accurate measure of YAAS's damages and I adopt it in its entirety.

I find that YAAS's damages as a result of TRU's breach of the Agreements based upon the Franchise Fee Analysis (excluding Kuwait franchise fees but including Kuwait cash flows) are $36.99 million for the countries included in the ATA and Al-Futtaim agreements. The addition of $9.45 million as franchise fees for the remainder of the countries in the Territory brings the total damage calculation to $46.44 million as of December 31, 1994.

I find that it is appropriate to add pre-judgment interest, from December 31, 1994 until the date of the Award at the New York statutory rate of 9% simple interest.

Finally, I have considered YAAS's request for attorney's fees. I find nothing in the Agreements that authorizes the award of attorney's fees and I am not persuaded that to do so would be appropriate in this case.

I have considered the other contentions raised by the parties, but I do not find that any of them would alter the foregoing determinations of the issues presented for decision and I therefore conclude that specific findings with respect thereto are unnecessary.

July 9, 1996

/s/ William L. D. Barrett
William L. D. Barrett, Arbitrator

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U.S. COURT OF APPEALS
SECOND CIRCUIT

AMERICAN ARBITRATION ASSOCIATION
Arbitration Tribunal

In the Matter of the Arbitration between

Re: 13 T 133 01103 93
TOYS "R" US, INC. AND TRU (HK) LIMITED
and
YUSUF AHMED ALGHANIM & SONS, W.L.L.

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into between the above-named Parties and dated November 16, 1982, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

1. Within thirty (30) days from the date of transmittal of this Award to the Parties, TOYS "R" US, INC. AND TRU (HK) LIMITED, hereinafter referred to jointly and severally as CLAIMANTS, shall pay to YUSUF AHMED ALGHANIM & SONS, W.L.L., hereinafter referred to as RESPONDENT, the sum of FORTY SIX MILLION FOUR HUNDRED FORTY THOUSAND DOLLARS ($46,440,000.00), plus interest thereon at the rate of nine percent (9%) per annum from December 31, 1994 through the date of this Award.

2. All claims of CLAIMANTS are denied.

3. All other counterclaims of the RESPONDENT, including its claim for attorneys fees, are denied.

4. The compensation of the Arbitrator totalling FIFTY ONE THOUSAND EIGHT HUNDRED NINETY DOLLARS AND SEVENTY SIX CENTS ($51,890.76), shall be borne equally by the Parties. Therefore, CLAIMANTS shall pay to the American Arbitration Association the sum of FIVE THOUSAND TWO HUNDRED FIFTY FIVE DOLLARS AND THIRTY EIGHT CENTS ($5,255.38), representing that portion of said compensation still due the Association.

5. The administrative fees and expenses of the American Arbitration Association totalling TWENTY TWO THOUSAND ONE HUNDRED FIFTY NINE DOLLARS AND SIX CENTS ($22,159.06), shall be borne equally by the Parties and the postponement fees shall be borne by the Party having requested same.

6. This Award is in full settlement of all claims and counterclaims submitted to this Arbitration.

/s/ William L.D. Barrett 7/11/96
William L.D. Barrett, Esq. / DATED

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U.S. COURT OF APPEALS
SECOND CIRCUIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, William L.D. Barrett, Esq., do hereby affirm upon my oath as Arbitrator that I am the Individual described in and who executed this instrument which is my Award.

7/11/96
(DATED)

/s/ William L.D. Barrett
(SIGNATURE)

District Court Opinion and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YUSUF AHMED ALGHANIM & SONS, W.L.L.,	:	
Petitioner,	:	
– against –	:	96 Civ. 5853 (LMM) *MEMORANDUM AND ORDER*
TOYS "R" US, INC. and TRU (HK) Limited,	:	
Respondents.	:	

McKENNA, D.J.

Petitioner moves to confirm, and respondents move to vacate, or, in the alternative, to modify, an arbitral Award dated July 11, 1996 (including a Partial Award dated May 4, 1994) in favor of petitioner against respondents in the sum of $46,440,000, with interest at 9% from December 31, 1994 through the date of the award (together with sums for the compensation of the arbitrator and American Arbitration Association fees and expenses).

Petitioner seeks confirmation pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), while respondents seeks vacation or modification under the Federal Arbitration Act ("FAA"). The Convention and the FAA afford overlapping coverage, and the fact that a petition to confirm is brought under the Convention does not foreclose a cross-motion to vacate under the FAA, *Spector v. Torenberg*, 852 F. Supp. 201, 205-6

(S.D.N.Y. 1994), and the Court will consider respondents' cross-motion under the standards of the FAA.[1]

Respondents assert three grounds for vacating the award: that it is "completely irrational"; that it manifestly disregards the law; and that it disregards and fails to honor the well-defined, explicit, and clearly applicable terms of the parties' agreement. (Resp. Mem. at 10-11.)

Respondents' basis for urging that the award should be vacated as completely irrational and as manifestly disregarding the law turns, principally, on the claim that there is no evidence to support an award of the magnitude arrived at by the arbitrator and that the damages found are speculative under New York law.[2]

The Court does not find respondents' arguments convincing. As the arbitrator made clear in his 47-page Memorandum of the Arbitrator ("Memorandum") which accompanies the award, in considering damages he relied in large measure on

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[1] Had respondents initiated this proceeding under the FAA, the Court, presumably, would not have had subject matter jurisdiction. "[T]he FAA, standing alone, does not provide a basis for federal jurisdiction." *Westmoreland Capital Corp. v. Findlay*, 1996 WL 654322 (2d Cir. Nov. 7, 1996), at *3. No basis for federal question jurisdiction (other than the Convention) is suggested, and, petitioner and one of respondents being alien entities, diversity jurisdiction is not available. *Lloyds Bank PLC* v. *Norkin*, 817 F. Supp. 414, 417 (S.D.N.Y. 1993). 9 U.S.C. § 203, however, confers federal question jurisdiction of proceedings brought under the Convention, and the Court perceives no reason why the present proceeding is not properly brought under the Convention. As noted, petitioner and one of the respondents are alien corporations, and the subject matter of the parties' agreements is conduct outside of the United States. *See Dworkin-Cosell Interair Courier Servs., Inc. v. Avraham*, 728 F. Supp. 156, 158-9 (S.D.N.Y. 1989). Since the Court has subject matter jurisdiction pursuant to 9 U.S.C. § 203, it may and does exercise supplemental jurisdiction over respondents' FAA challenge to the award. 28 U.S.C. § 1367.

[2] It is not disputed that the parties' agreements designated New York substantive law as applicable. Respondents emphasize the New York Court of Appeals' decision in *Kenford Co., Inc. v. County of Erie*, 67 N.Y.2d 257, 502 N.Y.S.2d 131 (1986).

expert testimony of an economist which in turn relied substantially on projections made by respondents, and ultimately chose, as a preferable basis for damages, the expert's Franchise Fee Analysis (rather than his Cash Flow Analysis) which he found to be based "on much more conservative assumptions" (Memorandum at 37), adding that "I find that this alternative, while it may well be less than fair to [petitioner] in not fully reflecting what it could have achieved, is firmly rooted in documented past events. I believe it is the preferable basis for damages in this case, and I so find." (*Id.* at 38.) The arbitrator specifically considered *Kenford. (Id.* at 44-45.)

The Court also finds respondents' argument that the arbitrator manifestly disregarded the terms of the parties' agreement unconvincing. Respondents claim that the arbitrator ignored Paragraphs 2.07(b), 7.04 and 8.01 of the parties' License and Technical Assistance Agreement. The arbitrator's Memorandum and the Partial Award show, however, that he did not. The applicability of Paragraph 2.07(b) is considered in substance (without specific reference to that numbered paragraph, however) at Memorandum 22-24; Paragraph 7.04 at 41-42; and Paragraph 8.01 in the Partial Award.

The Court finds that respondents have not established any ground for vacating the Award.

Respondents ask, in the alternative, that the Court reduce the amount of the Award. Respondents have shown no basis for such relief.

Petitioner is entitled to interest from the date of the Award to the date of entry of judgment. *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 154 (2d Cir. 1984). Since New York substantive law is applicable, the 9% New York statutory rate (chosen by the arbitrator for the period up to the date of the Award) will be applied from the date of the Award to the date of entry of judgment.

All applications for counsel fees and/or sanctions are denied.

For the foregoing reasons, the Clerk is directed to enter judgment (i) confirming the Award dated July 11, 1996 (including the Partial Award dated May 4, 1994), and (ii) in favor of petitioner against respondents in the sum of $46,440,000, with interest at 9% from December 31, 1994 to the date of entry of judgment.

Dated: New York, New York
December 13, 1996

SO ORDERED.

/s/ Lawrence M. McKenna

LAWRENCE M. McKENNA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YUSUF AHMED ALGHANIM & SONS, W.L.L.,

Petitioner,

– against –

TOYS "R" US, INC. and TRU (HK) LTD.,

Respondents.

U.S. DISTRICT COURT
DEC 19 1996
S.D. OF N.Y.

96 **CIVIL** 5853 (LMM)
JUDGMENT

Petitioner having moved to confirm an arbitration award against the respondents pursuant to the Federal Arbitration Act, 9 U.S.C. Section 9, and respondents move to vacate the award and the said motions having come before the Honorable Lawrence M. McKenna, United States District Judge, and the Court thereafter on December 13, 1996, having handed down its Memorandum and Order denying respondent's motion, and granting petitioner's motion to confirm the award of the arbitrator, and confirming the arbitration award dated, July 11, 1996 (including the partial award dated May 4, 1994), it is,

ORDERED, ADJUDGED AND DECREED: That the respondent's motion to vacate is denied and petitioner's motion to confirm the award of the arbitrator be and it is hereby granted in favor of the petitioner and against the respondent in the sum of $46,440,000, with interest at 9% from December 31, 1994 to date of entry, amounting to $8,256,129.90, for a total judgment of $54,696,129.90.

DATED: NEW YORK, NEW YORK
December 19, 1996

JAMES M. PARKISON
Clerk of Court

By: [illegible]
Deputy Clerk

Court of Appeals Opinion and Order

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1757 -- August Term, 1996

(Argued: June 25, 1997 Decided Sep 10, 1997)

Docket No. 96-9692

YUSUF AHMED ALGHANIM & SONS, W.L.L.,

Petitioner-Appellee,

- v. -

TOYS "R" US, INC.; TRU (HK) LIMITED,

Respondents-Appellants.

Before: MINER and McLAUGHLIN, *Circuit Judges*, and SCULLIN, *District Judge*.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York (McKenna, J.) denying respondents' cross-motion to vacate or modify an arbitration award and granting the petition to confirm the award, the court having found that, although the petition for confirmation was brought under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, respondents' cross-motion was governed by the Federal Arbitration Act, and that respondents' allegations of error in the arbitral award were without merit.

Affirmed.

MICHAEL S. FELDBERG, Schulte Roth & Zabel LLP, New York, NY (Antoinette Passanante, Schulte Roth & Zabel LLP, New York, NY, Dennis J. Block, Stephen A. Radian, Weil,

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* The Honorable Frederick J. Scullin, Jr. of the United States District Court for the Northern District of New York, sitting by designation.

Gotshal & Manges, New York, NY, of counsel), *for Respondents-Appellants*.

JOSEPH D. PIZZURRO, Curtis, Mallet-Prevost, Colt & Mosle, New York, NY (Herbert M. Lord, Michelle A. Rice, Curtis, Mallet-Prevost, Colt & Mosle, New York, NY, of counsel), *for Petitioner-Appellee*.

MINER, *Circuit Judge*:

Appeal from a judgment entered in the United States District Court for the Southern District of New York (McKenna, J.) denying respondents' cross-motion to vacate or modify an arbitration award and granting the petition to confirm the award. The court found that while the petition for confirmation was brought under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, respondents' cross-motion to vacate or modify the award was properly brought under the Federal Arbitration Act, and thus those claims were governed by the Federal Arbitration Act's implied grounds for vacatur. Nonetheless, the court granted the petition to confirm the award, finding that respondents' allegations of error in the arbitral award were without merit.

For the reasons that follow, we affirm.

BACKGROUND

In November of 1982, respondent-appellant Toys "R" Us, Inc. (collectively with respondent-appellant TRU (HK) Limited, "Toys 'R' Us") and petitioner-appellee Yusuf Ahmed Alghanim & Sons, W.L.L. ("Alghanim"), a privately owned Kuwaiti business, entered into a License and Technical Assistance Agreement (the "agreement") and a Supply Agreement. Through the agreement, Toys "R" Us granted Alghanim a limited right to open Toys "R" Us stores and use its trademarks in Kuwait and 13 other countries located in and around the Middle East (the "territory"). Toys "R" Us further agreed to supply Alghanim with its technology, expertise and assistance in the toy business.

From 1982 to the December 1993 commencement of the arbitration giving rise to this appeal, Alghanim opened four toy stores, all in Kuwait. According to Toys "R" Us, the first such store, opened in 1983, resembled a Toys "R" Us store in the United States, but the other three, two of which were opened in 1985 and one in 1988, were small storefronts with only limited merchandise. It is uncontested that Alghanim's stores lost some $6.65 million over the 11-year period from 1982 to 1993, and turned a profit only in one year of this period.

Following the Gulf War, both Alghanim and Toys "R" Us apparently concluded that their relationship needed to be altered. Representatives of Alghanim and Toys "R" Us's International Division met in September of 1991 and February of 1992. Alghanim expressed a desire for Toys "R" Us to contribute capital toward Alghanim's expansion into other countries. Alghanim advised that it would be willing to proceed in the business only under a new joint venture agreement that would shift a substantial portion of responsibility for capital expenditures to Toys "R" Us. Toys "R" Us was unwilling to take on a greater portion of this responsibility.

On July 20, 1992, Toys "R" Us purported to exercise its right to terminate the agreement, sending Alghanim a notice of non-renewal stating that the agreement would terminate on January 31, 1993. Alghanim responded on July 30, 1992, stating that because its most recently opened toy store had opened on January 16, 1988, the initial term of the agreement ended on January 16, 1993. Alghanim asserted that Toys "R" Us's notice of non-renewal was four days late in providing notice six months before the end of the initial period. According to Alghanim, under the termination provision of the agreement, Toys "R" Us's failure to provide notice more than six months before the fifth year after the opening of the most recent store automatically extended the term of the agreement for an additional two years, until January 16, 1995.

On September 2, 1992, Toys "R" Us sent a second letter. Toys "R" Us explained that, on further inspection of the

agreement, it had determined that the initial term of the agreement expired on December 31, 1993, and it again gave notice of non-renewal. In this letter, Toys "R" Us also directed Alghanim not to open any new toy stores and warned that failure to comply with that direction could constitute a breach of the agreement.

Through the balance of 1992 and 1993, the parties unsuccessfully attempted to renegotiate the agreement or devise a new arrangement. In September of 1993, the parties discussed Alghanim's willingness to relinquish its rights under the agreement. In one discussion, Amin Kadrie, Alghanim's chief operating officer and the head of its toy business, offered to "release the business right now" if Toys "R" Us would "give us $2 million for the losses we've incurred [in] trying to develop this business." (J.A. 457.) Toys "R" Us declined, offering instead to buy Alghanim's inventory at Alghanim's cost. The parties could not agree upon a reconciliation.

At the end of 1993, Toys "R" Us contracted with Al-Futtaim Sons Co., LLC ("Al-Futtaim") for the post-Alghanim rights to open Toys "R" Us stores in five of the countries under the agreement, including Kuwait, and with ATA Development Co. ("ATA") for the post-Alghanim rights to open Toys "R" Us stores in Saudi Arabia. These two companies initially offered $30 million for the rights, and eventually paid a total of $22.5 million.

On December 20, 1993, Toys "R" Us invoked the dispute-resolution mechanism in the agreement, initiating an arbitration before the American Arbitration Association. Toys "R" Us sought a declaration that the agreement was terminated on December 31, 1993. Alghanim responded by counterclaiming for breach of contract.

On May 4, 1994, the arbitrator denied Toys "R" Us's request for declaratory judgment. The arbitrator found that, under the termination provisions of the agreement, Alghanim had the absolute right to open toy stores, even after being given notice of termination, as long as the last toy store was opened within five years. The parties then engaged in

substantial document and expert discovery, motion practice, and a 29-day evidentiary hearing on Alghanim's counterclaims.

On July 11, 1996, the arbitrator awarded Alghanim $46.44 million for lost profits under the agreement, plus 9 percent interest to accrue from December 31, 1994. The arbitrator's findings and legal conclusions were set forth in a 47-page opinion.

Alghanim petitioned the district court to confirm the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted at* 9 U.S.C. § 201.[1] Toys "R" Us cross-moved to vacate or modify the award under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, arguing that the award was clearly irrational, in manifest disregard of the law, and in manifest disregard of the terms of the agreement. The district court concluded that "[t]he Convention and the FAA afford overlapping coverage, and the fact that a petition to confirm is brought under the Convention does not foreclose a cross-motion to vacate under the FAA, and the Court will consider [Toys "R" Us's] cross-motion under the standards of the FAA." (J.A. 569-70 (citation omitted).) By judgment entered December 20, 1996, the district court confirmed the award, finding Toys "R" Us's objections to the award to be without merit. This appeal followed.

DISCUSSION

I. Availability of the FAA's Grounds for Relief in Confirmation Under the Convention

Toys "R" Us argues that the district court correctly determined that the provisions of the FAA apply to its cross-motion to vacate or modify the arbitral award. In particular,

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[1] The Convention, frequently referred to as the "New York Convention" or the "1958 Convention," was enacted and opened for signature in New York City on June 10, 1958, and entered into force in the United States after ratification on December 29, 1970, as codified at 9 U.S.C. §§ 201-208.

Toys "R" Us contends that the FAA and the Convention have overlapping coverage. Thus, Toys "R" Us argues, even though the petition to confirm the arbitral award was brought under the Convention, the FAA's implied grounds for vacatur should apply to Toys "R" Us's cross-motion to vacate or modify because the cross-motion was brought under the FAA. We agree that the FAA governs Toys "R" Us's cross-motion.

A. Applicability of the Convention

Neither party seriously disputes the applicability of the Convention to this case and it is clear to us that the Convention does apply. The Convention provides that it will

> apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards *not considered as domestic awards* in the State where their recognition and enforcement are sought.

Convention art. I(1) (emphasis added). The Convention does not define nondomestic awards. *See Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983). However, 9 U.S.C. § 202, one of the provisions implementing the Convention, provides that

> [a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

In *Bergesen*, we held "that awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having

their principal place of business outside the enforcing jurisdiction." 710 F.2d at 932 (quoting 9 U.S.C. § 201). The Seventh Circuit similarly has interpreted § 202 to mean that "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention." *Jain v. de Méré*, 51 F.3d 686, 689 (7th Cir.), *cert. denied*, 116 S. Ct. 300 (1995).

The Convention's applicability in this case is clear. The dispute giving rise to this appeal involved two nondomestic parties and one United States corporation, and principally involved conduct and contract performance in the Middle East. Thus, we consider the arbitral award leading to this action a non-domestic award and thus within the scope of the Convention.

B. Authority Under the Convention to Set Aside An Award Under Domestic Arbitral Law

Toys "R" Us argues that the district court properly found that it had the authority under the Convention to apply the FAA's implied grounds for setting aside the award. We agree.

Under the Convention, the district court's role in reviewing a foreign arbitral award is strictly limited: "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207; *see Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 699 n.11 (2d Cir. 1978). Under Article V of the Convention, the grounds for refusing to recognize or enforce an arbitral award are:

> (a) The parties to the agreement . . . were . . . under some incapacity, or the said agreement is not valid under the law . . . ; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of

> the arbitrator or of the arbitration proceedings . . . ; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention art. V(l). Enforcement may also be refused if "[t]he subject matter of the difference is not capable of settlement by arbitration," or if "recognition or enforcement of the award would be contrary to the public policy" of the country in which enforcement or recognition is sought. *Id.* art. V(2). These seven grounds are the only grounds explicitly provided under the Convention.

In determining the availability of the FAA's implied grounds for setting aside, the text of the Convention leaves us with two questions: (1) whether, in addition to the Convention's express grounds for refusal, other grounds can be read into the Convention by implication, much as American courts have read implied grounds for relief into the FAA, and (2) whether, under Article V(1)(e), the courts of the United States are authorized to apply United States procedural arbitral law, i.e., the FAA, to nondomestic awards rendered in the United States. We answer the first question in the negative and the second in the affirmative.

1. Availability Under the Convention of Implied Grounds for Refusal

We have held that the FAA and the Convention have "overlapping coverage" to the extent that they do not conflict. *Bergesen*, 710 F.2d at 934; *see* 9 U.S.C. § 208 (FAA may apply to actions brought under the Convention "to the extent that [the FAA] is not in conflict with [9 U.S.C. §§ 201-208] or the Convention as ratified by the United States"); *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir.1997), *petition for cert. filed*, 65 U.S.L.W. 3799 (U.S. May 19, 1997) (No. 96-1844). However, by that same token, to the extent that the Convention prescribes the exclusive grounds for relief from an award under the Convention, that application of the FAA's implied grounds would be in conflict, and is thus precluded. *See, e.g., M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996)

In *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), we declined to decide whether the implied defense of "manifest disregard" applies under the Convention, having decided that even if it did, appellant's claim would fail. *See id.* at 977. Nonetheless, we noted that "[b]oth the legislative history of Article V and the statute enacted to implement the United States' accession to the Convention are strong authority for treating as exclusive the bases set forth in the Convention for vacating an award." *Id.* (citation and footnote omitted).

There is now considerable caselaw holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award. *See, e.g., M & C*, 87 F.3d at 851 (concluding that the Convention's exclusive grounds for relief "do not include miscalculations of fact or manifest disregard of the law"); *International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial*, 745 F. Supp. 172, 181-82 (S.D.N.Y. 1990) (refusing to apply

a "manifest disregard of law" standard on a motion to vacate a foreign arbitral award); *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F. Supp. 160, 167 (S.D.N.Y. 1987) ("In my view, the 'manifest disregard' defense is not available under Article V of the Convention or otherwise to a party . . . seeking to vacate an award of foreign arbitrators based upon foreign law."); *see also* Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 265 (1981) ("*the grounds mentioned in Article V are exhaustive*"). This conclusion is consistent with the Convention's pro-enforcement bias. *See, e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 & n.15 (1974); *Parsons*, 508 F.2d at 973. We join these courts in declining to read into the Convention the FAA's implied defenses to confirmation of an arbitral award.

2. Nondomestic Award Rendered in the United States

Although Article V provides the exclusive grounds for refusing confirmation under the Convention, one of those exclusive grounds is where "[t]he award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Convention art. V(1)(e). Those courts holding that implied defenses were inapplicable under the Convention did so in the context of petitions to confirm awards rendered abroad. These courts were not presented with the question whether Article V(1)(e) authorizes an action to set aside an arbitral award under the domestic law of the state in which, or under which, the award was rendered.[2] We, however, are faced head-on with that question in is the case before us, because the arbitral

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[2] In both *Celulosa del Pacifico S.A. v. A. Ahlstrom Corp.*, No. 95 Civ. 9586, 1996 WL 103826 (S.D.N.Y. Mar. 11, 1996), and *Avraham v. Shigur Express Ltd.*, No. 91 Civ. 1238, 1991 WL 177633 (S.D.N.Y. Sept. 4, 1991), district courts in this Circuit refused to recognize the applicability of the FAA's implied grounds for relief to nondomestic awards that had been rendered in the United States and were subject to confirmation under the Convention. However, in neither case did the district court address the significance of Article V(1)(e).

award in this case was rendered in the United States, and both confirmation and vacatur were then sought in the United States.

We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award. The district court in *Specter v. Torenberg*, 852 F. Supp. 201 (S.D.N.Y. 1994), reached the same conclusion as we do now, reasoning that, because the Convention allows the district court to refuse to enforce an award that has been vacated by a competent authority in the country where the award was rendered, the court may apply FAA standards to a motion to vacate a non-domestic award rendered in the United States. *See id.* at 205-06 & n.4.

The Seventh Circuit has agreed, albeit in passing, that the Convention "contemplates the possibility of the award's being set aside in a proceeding under local law." *Lander*, 107 F.3d at 478 (citing Article V(1)(e)). Likewise, the United States District Court for the District of Columbia has found that, in an arbitration conducted in Egypt and under Egyptian law, nullification of the award by the Egyptian courts falls within Article V(1)(e). See *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 909 (D.D.C. 1996).

Our conclusion also is consistent with the reasoning of courts that have refused to apply non-Convention grounds for relief where awards were rendered outside the United States. For example, the Sixth Circuit in *M & C* concluded that it should not apply the FAA's implied grounds for vacatur, because the United States did not provide the law of the arbitration for the purposes of Article V(1)(e) of the Convention. 87 F.3d at 849. Similarly, in *International Standard*, the district court decided that only the state under whose procedural law the arbitration was conducted has jurisdiction under Article V(1)(e) to vacate the award, whereas on a petition for confirmation made in any other state, only the defenses to

confirmation listed in Article V of the Convention are available. 745 F. Supp. at 178.

This interpretation of Article V(1)(e) also finds support in the scholarly work of commentators on the Convention and in the judicial decisions of our sister signatories to the Convention. There appears to be no dispute among these authorities that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state.[3] As one commentator has explained:

> The possible effect of this ground for refusal [Article V(1)(e)] is that, as the award can be set aside in the country of origin on *all* grounds contained in the arbitration law of that country, including the public policy of that country, the grounds for refusal of enforcement under the Convention may indirectly be extended to include all kinds of particularities of the arbitration law of the country of origin. This might undermine the limitative character of the grounds for refusal listed in Article V . . . and thus decrease the degree of uniformity existing under the Convention.

van den Berg, *supra*, at 355; *see also* Case No. 2 Nd 502/80 (Feb. 1, 1980) (Aus.), *excerpted in* 7 Y.B. Com. Arb. 312, 313 (1982) (in action to set aside an arbitral award, court applies "the law of the country in which the award has been made"). The defense in Article V(1) (e)

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[3] Although most courts and commentators assume that Article V(1)(e) is applicable to the state in which the award is rendered, we note that Article V(1)(e) specifically contemplates the possibility that an award could be rendered in one state, but under the arbitral law of another state. *See* Convention art. V(1)(e) ("or has been set aside or suspended by a competent authority of the country in which, *or under the law of which*, that award was made" (emphasis added)). In the rare instance where that is the case, Article V(1)(e) would apply to the state that supplied the arbitral law under which the award was made. *See, e.g.*, van den Berg, *supra*, at 350. This situation may be so rare as to be a "dead letter." *See id.* at 28.

> incorporates the entire body of review rights in the issuing jurisdiction . . . . If the scope of judicial review in the rendering state extends beyond the other six defenses allowed under the New York Convention, the losing party's opportunity to avoid enforcement is automatically enhanced: The losing party can first attempt to derail the award on appeal on grounds that would not be permitted elsewhere during enforcement proceedings.

Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 Int'l Law. 693, 694 (1988).

Indeed, many commentators and foreign courts have concluded that an action to set aside an award can be brought *only* under the domestic law of the arbitral forum, and can never be made under the Convention. *See Shenzhen Nan Da Indus. & Trade United Co. v. FM Int'l Ltd.*, 1992 H.K. Law Digest C6 (Sup. Ct. H.K. Mar. 2, 1991), *excerpted in* 18 Y.B. Com. Arb. 377, 382 (1993) ("Various decisions have made clear that the Convention is not applicable for setting aside awards. The court of the country of origin of the award is the only court competent to rule."); van den Berg, *supra*, at 20 ("[T]he Convention is not applicable in the action for setting aside the award."); *id.* ("These provisions affirm the well-established principle of current international commercial arbitration that the court of the country of origin is exclusively competent to decide on the setting aside of the award."); Jan Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 Va. J. Int'l L. 211, 242 (1981) ("[T]he fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made.").

There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law. The Convention succeeded and replaced the Convention on the Execution of Foreign Arbitral Awards

("Geneva Convention"), Sept. 26, 1927, 92 L.N.T.S. 301. The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad, *see* Geneva Convention arts. 1(d), 4(2), 92 L.N.T.S. at 305, 306, the so-called requirement of "double *exequatur*." *See* Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 Wm. Mitchell L. Rev. 867, 876-77 (1996); W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 Tex. Int'l L.J. 1, 9 (1995). This requirement "was an unnecessary time-consuming hurdle," van den Berg, *supra*, at 267, and "greatly limited [the Geneva Convention's] utility," Craig, *supra*, at 9.

The Convention eliminated this problem by eradicating the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad. In so doing, the Convention intentionally "liberalized procedures for enforcing foreign arbitral awards," Volz & Haydock, *supra*, at 878; *see Scherk*, 417 U.S. at 519-20 & n.15; *Parsons*, 508 F.2d at 973 (noting "[t]he general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention").

Nonetheless, under the Convention, the power and authority of the local courts of the rendering state remain of paramount importance. "What the Convention did not do . . . was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration." Craig, *supra*, at 11. Another commentator explained:

> Significantly, [Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action

> would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.

Leonard V. Quigley, *Accession by the United State to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1070 (1961). From the plain language and history of the Convention, it is thus apparent that a party may seek to vacate or set aside an award in the state in which, or under the law of which, the award is rendered. Moreover, the language and history of the Convention make it clear that such a motion is to be governed by domestic law of the rendering state, despite the fact that the award is nondomestic within the meaning of the Convention as we have interpreted it in *Bergesen*, 710 F.2d at 932.

In sum, we conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. *See* Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.

II. Application of FAA Grounds for Relief

Having determined that the FAA does govern Toys "R" Us's cross-motion to vacate, our application of the FAA's implied grounds for vacatur is swift. The Supreme Court has stated "that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995). We review the district

court's findings of fact for clear error and its conclusions of law *de novo*. *See id.*

"[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). The review of arbitration awards is "very limited . . . in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). Accordingly, "the showing required to avoid summary confirmance is high." *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987).

More particularly, "[t]his court has generally refused to second guess an arbitrator's resolution of a contract dispute." *John T. Brady & Co. v. Form-Eze Sys., Inc.*, 623 F.2d 261, 264 (2d Cir. 1980). As we have explained: "An arbitrator's decision is entitled to substantial deference, and the arbitrator need only explicate his reasoning under the contract 'in terms that offer even a barely colorable justification for the outcome reached' in order to withstand judicial scrutiny." *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) (quoting *Andros Compania*, 579 F.2d at 704).

However, awards may be vacated, *see* 9 U.S.C. § 10, or modified, *see id.* § 11, in the limited circumstances where the arbitrator's award is in manifest disregard of the terms of the agreement, *see Leed Architectural Prods., Inc. v. United Steelworkers, Local 6674*, 916 F.2d 63, 65-66 (2d Cir. 1990), or where the award is in "manifest disregard of the law," *Fahnestock Co. v. Waltman*, 935 F.2d 512, 515-16 (2d Cir. 1991); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Booker*, 808 F.2d 930, 933-34 (2d Cir. 1986). We find that neither of these implied grounds is met in the present case.

A. Manifest Disregard of the Law

Toys "R" Us argues that the arbitrator manifestly disregarded New York law on lost profits awards for breach of

contract by returning a speculative award. This contention is without merit. "[M]ere error in the law or failure on the part of the arbitrator[ ] to understand or apply the law" is not sufficient to establish manifest disregard of the law. *Fahnestock*, 935 F.2d at 516 (quotations omitted). For an award to be in "manifest disregard of the law,"

> [t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Merrill Lynch, 808 F.2d at 933.

In the instant case, the arbitrator was well aware of and carefully applied New York's law on lost profits.[4] The arbitrator specifically addressed *Kenford Co. v. County of Erie*, 67 N.Y.2d 257 (1986), which contains New York's law on the subject and upon which Toys "R" Us relied in its arguments,[5] and concluded:

> I do not think the Kenford case rules out damages in this case. Kenford disallowed damages based on future profits from concessions in a domed stadium that was never built . . . . In this case [Alghanim], which is forced into the estimating posture because of [Toys "R" Us's] breach, bases its damages not on its own experience but on [Toys "R" Us's]. [Toys "R" Us] has hundreds of toy stores worldwide.

---

[4] There is no dispute that New York law controls.

[5] In *Kenford*, lost profits were unavailable to the prevailing party because such an award would "require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty." 67 N.Y.2d at 262; *see Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 425 (1996).

> Since it has been found that the Agreements require [Toys "R" Us] to provide a wide variety of services, similar to what it provides its own toy stores, I find that [Alghanim's] method of estimating damages is reasonable and believable, and provides a sound basis on which to fashion the award.

(J.A. 557.) We find no manifest disregard of the law in this analysis.

Toys "R" Us also argues that the arbitrator manifestly disregarded the law of lost profits by ignoring the facts that (1) Alghanim's toy business had lost a total of $6.65 million over the course of its existence under the agreement, and (2) Alghanim itself offered to relinquish its rights for $2 million. Toys "R" Us further contends that the calculation of lost profits was irrational. We reject these contentions as well.

The fact that Alghanim lost $6.65 million over ten years does not make the arbitrator's award of future lost profits of $46 million "completely irrational." Past losses do not necessarily negate any expectation of future profits. *See, e.g., Lamborn v. Dittmer*, 873 F.2d 522, 533 (2d Cir. 1989) ("[W]e reject outright the suggestion in Dittmer's papers that a business with no history of profits is necessarily valueless.").

As to the purported $2 million buyout offer, no witness has testified that the $2 million figure was an estimate of the value of Alghanim's toy business. Kadrie, the primary Alghanim officer involved with the toy business, testified that, in his understanding, settlement with Toys "R" Us would serve to provide Alghanim "some relief on the cost of liquidating [its] inventory." (J.A. 405-06.) Accordingly, Alghanim argues that $2 million was the value Alghanim placed on its inventory at the time. Furthermore, according to a Toys "R" Us executive, Kadrie, in making this offer, expressly stated that the $2 million was to recoup losses Alghanim had incurred in trying to develop the business. Therefore, there is no proof that this figure was Alghanim's, or anyone else's, estimation of the value of the business. Thus, the arbitrator did

not manifestly disregard lost profits law in refusing to treat the $2 million figure as a buyout offer.

We also reject Toys "R" Us's contention that the arbitrator's calculation of lost profits was in manifest disregard of the law. Toys "R" Us contends that the actual operating results of the Toys "R" Us stores in the territory since the breach of the agreement have been lower than the arbitrator's valuation would suggest. The arbitrator explicitly addressed this issue, reasoning that

> [Alghanim's] damages are to be calculated as of September 2, 1992 and are based on what its rights were worth at that time. More importantly, since the start of this case in late 1993 it has been clear that large stakes are involved and that [Toys "R" Us's] actual results of operations in the Middle East could have a bearing on this case. The record does not provide a sufficient basis to disentangle [Toys "R" Us's] actual results . . . from what might have been the business results of [Toys "R" Us's] Mid-East venture if this case had never existed.

(J.A. 558.) There is no manifest disregard in the arbitrator's refusal to credit actual operating results for the period following the breach in calculating the value of the business at the time of the breach.

Toys "R" Us also argues that the arbitrator was wholly irrational in calculating the value of the Saudi Arabian rights as the $15 million ATA initially offered for those rights, when ultimately ATA only paid $7.5 million. However, the fact that a disinterested third party valued the Saudi Arabian rights at $15 million near the time of the breach provides a rational basis for accepting that valuation. Therefore, we see no manifest disregard in the arbitrator's use in his calculations of the bid price, rather than the actual closing price, for the sale to ATA. Thus, we see no merit in Toys "R" Us's contentions of manifest disregard of the law.

B. Manifest Disregard of the Agreement

Toys "R" Us also argues that the district court erred in refusing to vacate the award because the arbitrator manifestly disregarded the terms of the agreement. In particular, Toys "R" Us disputes the arbitrator's interpretation of four contract terms: (1) the termination provision; (2) the conforming stores provision; (3) the non-assignment provision; and (4) the deletion provision. We find no error.

Interpretation of these contract terms is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). We will overturn an award where the arbitrator merely "mak[es] the right noises--noises of contract interpretation--" while ignoring the clear meaning of contract terms. *In re Marine Pollution*, 857 F.2d at 94 (quotation omitted). We apply a notion of "manifest disregard" to the terms of the agreement analogous to that employed in the context of manifest disregard of the law.

As to each of these contract provisions, Toys "R" Us merely takes issue with the arbitrator's well-reasoned interpretations of those provisions, and simply offers its own contrary interpretations. Toys "R" Us does not advance a convincing argument that the arbitrator manifestly disregarded the agreement. We will not overturn the arbitrator's award merely because we do not concur with the arbitrator's reading of the agreement. For the reasons stated by the district court, we find the arbitrator's interpretation of the contractual provisions supportable.

We have carefully considered Toys "R" Us's remaining contentions and find them all to be without merit.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Stay of Mandate

United States Court of Appeals
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

Yusuf Ahmed Alghanim & Sons, W.L.L.

Petitioner-Appellee,

v.

Toys "R" Us, Inc. and TRU (HK) Limited,

Respondents-Appellants

Use short title

96-9692
Docket Number

NOTICE OF MOTION
state type of motion
for Stay of Mandate Pending Petition For Writ of Certiorari

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
SEP 24 1997

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Schulte Roth & Zabel, LLP
900 Third Avenue
New York, New York 10022
(212) 756-2000
By: Michael S. Feldberg

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Curtis, Mallet-Prevost, Colt & Mosle
101 Park Avenue
New York, New York 10178
(212) 696-6000
By: Joseph D. Pizzurro

Has consent of opposing counsel:

A. been sought? ☐ Yes ☒ No

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☐ No

B. by firm date of argument notice? ☐ Yes ☐ No

C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not:

This is a request for a stay of this Court's mandate pending appeal to the Supreme Court.

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:

District Court: Judge Lawrence M. McKenna,

S.D.N.Y./Second Circuit: Miner and McLaughlin, C. and

Scullin, N.D.N.Y.

Brief statement of the relief requested:

Stay of mandate pending petition to the United States Supreme Court for a Writ of Certiorari.

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Michael S. Feldberg

Signed name must be printed beneath

Michael S. Feldberg

Appearing for: *(Name of party)*
Toys "R" Us, Inc. and
TRU (HK) Limited

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

9/23/97
Date

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted

FOR THE COURT:
GEORGE LANGE III, Clerk
by:

/s/ Beth J. Meador

Beth J. Meador, Administrative Attorney

10/3/97
Date

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
OCT 3 1997
GEORGE LANGE III, CLERK

Statutory and Contractual Provisions Involved

Statutory and Contractual Provisions Involved

Statutes

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4) (1997).

An action or proceeding falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards] shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or

proceeding, regardless of the amount in controversy.

9 U.S.C. § 203.

Contractual Provisions

The pertinent provisions of the License and Technical Agreement Between Toys "R" Us, Inc., TRU (HK) Limited and Yusuf Ahmed Alghanim & Sons, W.L.L. (YAAS), signed and executed on November 16, 1982 in New York, New York, are as follows:

1.03 "territory" means the countries presently known as Kingdom of Saudi Arabia, Kuwait, United Arab Emirates, Qatar, Oman, Bahrain, Yemen, Egypt, Sudan, Jordan, Lebanon, Syria, Iraq and Iran.

* * *

2.01 TRU hereby grants to YAAS a license, without the right to assign the same or to grant sublicenses, to use the TRU-Trademarks solely in connection with the sale of merchandise in YAAS Toy Stores in the territory during the term of this Agreement [remainder of section omitted]

* * *

2.02 YAAS acknowledges that the TRU-Trademarks and all rights therein and goodwill pertaining thereto belong exclusively to TRU. YAAS will not, during the term of this Agreement or thereafter, attack the title or any rights of TRU in and to the Trademarks or any other protection or other right pertaining thereto, or do, or omit to do, any act or thing so as to discredit or impair the value and prestige of the TRU-Trademarks.

* * *

2.07 YAAS acknowledges that the TRU-Trademarks constitute a unique and valuable asset of TRU and, are an inextricable element of TRU's goodwill. YAAS further acknowledges that the use of the TRU-Trademarks in conjunction with products of less than superior quality,

or in association with less than the highest standards of advertising, promoting, selling and merchandising, would cause irreparable harm to TRU's goodwill and incalculable injury to the TRU-Trademarks as a unique and valuable asset of TRU. Therefore, YAAS agrees, without prejudice to the provisions of Section 2.01 and 2.07(e) hereof that:

(a) [omitted]

(b) YAAS will consult with TRU in advance concerning the location, size, design, construction and layout of each YAAS Toy Store and comply in all material respects with TRU's usual standards concerning the same. Each YAAS Toy Store will be constructed, finished, painted and maintained in accordance with the highest commercial standards prevalent in the territory.

(c) [omitted]

* * *

4.01 Although it is in the interests of both parties that the YAAS Toy Store business be financially successful, YAAS recognizes that it alone bears the responsibility for raising the necessary capital to finance the business (including the purchase of merchandise), acquiring or constructing the necessary store and warehouse facilities, and retaining the necessary management and other personnel for the operation of the business. YAAS acknowledges that, except for the services which TRU has specifically agreed in this Agreement to provide, TRU has no obligation, financial or otherwise. [remainder of section omitted]

* * *

7.04 In the event that at any time after a period of two (2) years from the date of this Agreement, TRU receives a bona fide offer from a third party to open a store similar to YAAS Toy Stores in any country of the territory

where no YAAS Toy Store exists, TRU shall direct said third Party to YAAS who shall have a right of first refusal to consider such offer or to open otherwise a YAAS Toy Store in such country; if YAAS declines such offer and does not open such a store within two (2) years from the date such offer is referred to YAAS, then TRU shall be free thereafter to engage in the toy business in such country with or through such parties and in such manner as it chooses and such country or countries would be deemed to have been deleted from the list of the countries included in the definition of territory.

* * *

8.01 This Agreement is effective as of November 16, 1982 and will remain in force for five (5) consecutive calendar years after the date of opening of the most recently opened YAAS Toy Store in the territory; thereafter, the term of this Agreement will be automatically renewed for additional terms of two (2) consecutive calendar years each, unless either party shall give the other notice of its intention not to so renew not less than six (6) consecutive calendar months prior to the expiration of the initial or any renewed term then in effect.

* * *

9.01 The validity, construction and performance of this Agreement shall be governed by and interpreted in accordance with the laws of the State of New York, without giving effect to the choice of law principles thereof.

* * *

9.10 In the event of any dispute or difference of opinion between the parties arising out of or in connection with this Agreement, each of the parties shall use its best efforts to settle such dispute or difference of opinion amicably by negotiation. All disputes which cannot be amicably settled by negotiation shall be finally settled by arbitration to be held in New York City in

accordance with the Rules of the American Arbitration Association, and judgment upon any award rendered in any such arbitration may be entered in any court of competent jurisdiction.

President's Letter

President's Letter

While no single year defines an organization, the strides made in 1996 speak volumes about where the American Arbitration Association is headed and what we intend to become. The landmark accomplishments of the last 12 months — representing an extensive effort by staff and board — signal real progress towards strategic goals linked to both the quality and the range of services we offer.

Two short years ago, we set out to reshape the AAA within the context of our traditional mission and in line with our clients' needs today and for the foreseeable future. In the past year, we achieved four important objectives:

* the review of our national commercial panel of arbitrators and mediators, a huge undertaking,

* the launch of a regional, four-office case administration pilot project that may well prove to be a blueprint for the future,

* the institution of new rules and procedures for employment and construction, a newly constituted panel for large, complex cases, along with the development of recommended reforms for the handling of mass tort cases, and

* the further strengthening of the Association's financial footings and control systems.

Most encouraging of all, these achievements came against the backdrop of a very good year. Our overall caseload rose to a record 70,516 cases, an increase of about 13% year to year, and for the third successive year the AAA recorded solid bottom line gains. At the close of the year, our net revenues had risen by 10% over the previous year, generating a significant annual surplus. These funds are earmarked for the improvement of client services, educational programs, and research and development.

Each of the objectives reached in the past year is linked to one of our principal strategic themes: improving the quality of our services in line with the needs of clients. Each also tracks with three of our basic mission goals: providing arbitrators and mediators with outstanding qualifications, assuring expeditious and expert case management, and continuously refining dispute resolution processes. The fourth — offering first-rate education and training resources — is being achieved and will be an area of intense focus in the coming year.

The panel revision, for example, was carried out in direct response to what we were hearing from the users of our services. Working in concert with regional and national advisory councils, we undertook an across-the-board review of the composition of our commercial panel, which had clearly become unwieldy in terms of size. We also examined the way in which arbitrators and mediators are selected for inclusion in panels. With the project completed on schedule in mid-year, the reconstituted panel — roughly one-fifth its former size — has been greeted with a high level of enthusiasm in the market place. The praise is for both the quality of neutrals and the enhanced level of information now available about panel members.

DALLAS PILOT PROJECT

Similarly, the case administration pilot project launched in our Dallas office in August also has its roots in seeking ways to improve our services to clients. Effective case management — the information-provision, scheduling, and case-monitoring services provided throughout the hearing process to make an arbitration or mediation run smoothly for all involved — is one of our key points of differentiation. Over the past few years, however, there was a growing concern within the Association that attempting to deliver consistent, reliable case administration from 38 offices across a variety of increasingly specialized areas strains our organization's resources and limits our effectiveness.

The examination of these issues over a four-month period by a nine-person internal task force led to the pilot project in

Dallas. The bulk of the case management work for three smaller offices — Houston, Denver and New Orleans — is being concentrated in Dallas along with that office's own caseload. A rapidly growing regional service center with cutting edge technology, the Dallas office is an ideal "laboratory" in which to conduct this enhancement of core services, and to date the results have been excellent.

While the panel revision was a sizable undertaking because of the sheer number of neutrals involved, change to a core service such as case administration calls for both vision and courage on the part of our professional staff. While there was understandable apprehension initially, the need to improve the model has gained broad acceptance across the organization and enthusiastic backing from those participating directly. The critical step in the process was realizing that — from our clients' standpoint — these changes represent an enhancement rather than a reduction of local service. Each office will continue to have staff focused on client service and market development activities along with panels of neutrals dedicated to its region and caseload. No offices are being closed. In fact, we opened two new offices in the past year, both in Virginia — one in Richmond and the second in McLean.

Out of the AAA's National Employment Conclave held in Washington late in 1995 came a massive effort involving literally hundreds of employment experts across the country. The goal was to develop national standards of fairness in employer/employee disputes. Regional panels, which included both management and plaintiff voices, fed suggestions into a National Employment Task Force. The work of the task force resulted in new national rules for the resolution of employment disputes, which incorporate due process standards agreed upon in the Spring of 1995. The new employment rules, a set of established procedures in areas where the courts have yet to definitively rule, have gained wide acceptance in a relatively short time.

AN EMPLOYMENT RESOURCE

The development of these rules and protocols and the fostering of their acceptance is an important undertaking. With a fivefold increase in employment litigation over the past 20 years, a growing number of companies are seeking dispute resolution alternatives that are fair to employees, expeditious, and avoid the expense and disruption of litigation. One of our chief goals in 1997 is to continue to spread the word about the efficacy of the employment protocols and to serve as an educational resource for those seeking information in this area. To date, more than 300 large employers covering 3.5 million employees worldwide have initiated AAA-administered ADR workplace policies and plans.

Much of the progress made in workplace and employment issues since 1995 has roots in work done over several decades with leading labor organizations. Two of them — the National Academy of Arbitrators and the Industrial Relations Research Association — celebrate, in 1997, fifty years of distinguished service, and we salute their accomplishments.

CORPORATE COUNSEL COLLOQUIES

Our corporate counsel colloquy program is one of the vehicles we used last year to expose clients to the benefits of employment ADR policies. Established in 1995, the corporate colloquies are a series of informational meetings organized by AAA board members and focused on a single topic. Typically, there are about 12 general counsels participating, and these meetings have proved to be an excellent means of sharing experiences and developing new approaches to common problems.

The pivotal role played by our board in setting up and directing colloquies is just one example of the tremendous support our directors are giving the organization. The Governance Committee, for example, has helped revise our bylaws and finalized a board of directors mission statement over the last year and a half. In the financial area, the Investment Committee has overseen a doubling of the value of our investment

portfolio in two years, and the Audit Committee supported the addition of an internal auditor and tightening of our financial control systems.

All of the developments discussed to this point represent a closing of the chapter opened in 1995, when we outlined the steps needed to make the AAA more vital and responsive while preserving its traditional values and strengths. I am proud of the way in which this organization has responded to what have been both difficult choices and heady challenges. This has not been a scattershot approach — on each project initiated, the staff has followed through according to plan, meeting deadlines and service objectives. Most importantly, the results in terms of improved client services are there for all to see — in panel composition, case management, process development, global services, and a host of other areas.

The greatest excitement, however, is to be found in what lies ahead, the next chapter. We see vast opportunity to expand and continue refining the services we offer. For the immediate future, we see four themes dominating: the ongoing broadening of the AAA's role in international ADR, an expanded focus of our educational role, a growing emphasis on mediation, and — in support of all we do — the fostering of partnerships with other organizations to communicate our institutional messages through a variety of channels.

GROWING INTERNATIONAL ADR INTEREST

We are seeing, literally on a day-by-day basis, a rapidly growing interest in international ADR. With the opening up of world trade, inquiries are coming in from countries around the globe seeking information about establishing ADR programs or about initiating partnerships or affiliations. No one, it appears, is anxious to submit business disputes to the vagaries of foreign courts, and there is now a widespread recognition that institutional assistance should be part of every trading partner's tool kit. Following the reconstitution last year of our international panel, a refinement of international rules and procedures, and the introduction of case administration by multilingual lawyers, the flow of cases into our

international case administration center in New York is more than twice what it was a year ago. In the first eight months of operation in its new format, it handled disputes ranging in value from $10,000 to $50 million and involving parties from 24 different countries.

The warm reception accorded CAMCA — the Commercial Arbitration and Mediation Center for the Americas — has spurred inquiries from a number of Latin American and Asian nations. Much of CAMCA's appeal is that, tripartite in structure — the United States, Mexico and Canada — it is not dominated by a single nation. Its rules and procedures are widely recognized and accepted, and its dedicated panel of neutrals is well qualified and recognized as ADR experts in the international arena.

In the last two years, we have addressed a portion of our education priorities. We launched a new case administrator training program in 1995, and we continue to help our neutrals improve their conflict management skills. In the coming year, we will examine ways to expand our educational outreach to provide training in negotiation and other skills for third parties. Part of this process will involve other organizations as partners and the formation of a broad-based "think tank" to help us establish the proper direction.

MEDIATION: A MAJOR FOCUS

Advancing the cause of mediation and fostering recognition of its value in dispute resolution is a major goal for 1997. Although the word "mediation" does not appear in this organization's name, it is clearly a growing part of our business. We have, for example, established 25 regional panels of mediators to handle workplace disputes. They are balanced with respect to gender, age and racial and ethnic diversity. We are currently exploring ways to make this resource available to the EEOC to help reduce its huge backlog of workplace cases. We will continue to train similar small, high quality panels of mediators to address specific types of disputes, and are working on the development of an international mediation training program, the first of its kind in the world.

Lastly, we intend to be aggressive in seeking opportunities presented by potential joint ventures, affiliations, and partnerships — a reflection of our determination to employ whatever channels are available to fulfill the educational and process development aspects of our mission. We are, for instance, a primary sponsor along with *Forbes* Magazine of "The Alternative Dispute Resolution Superconference" to be held in Washington in April. Other sponsors include The American Corporate Counsel Association, the American Institute of Certified Public Accountants, and the National Association of Manufacturers. We are also engaged with The Association of the Bar of the City of New York and the International Bar Association in planning International Arbitration Day to be held in September 1997 in New York.

The AAA's World Wide Web site, a newer communications channel launched last year, is both highly rated and highly used. As we write, our Web site is receiving 76,000 inquiries per month, some of which are from attorneys who are directly downloading standard language, clauses, rules and procedures as they draft agreements. In another Web-related development, we established the Virtual Magistrate Project, a pilot effort in conjunction with the National Center for Automated Information Research and the Cyberspace Law Institute. It is a resolution forum — with a 72-hour turnaround time — for disputes relating to the use of the Internet. In the publications area, we launched *ADR Currents,* a newsletter of dispute resolution law and practice, and entered into an agreement to make our publications available online through the ADR library of LEXIS.

Talk about the Web brings us full circle to what we are and what we hope to become. The theme of this report — closing one chapter and opening a new one — is appropriate. Much of our value as an organization is tied to the best of our history — our permanence as an organization, our dedication to our role as an educational resource and as an agent for change: standard bearer and standard setter. While we have the confidence and maturity to be secure in our roots and traditional mission, at the same time, as an advertising tag line expressed

it a few years ago, "This is not your *father's* Oldsmobile." Much of our future value lies in a willingness to adapt, a thirst to improve, and an ability to look beyond today to the needs of tomorrow.

All in all an excellent year for the Association — solid accomplishments, difficult challenges met and answered, an overwhelmingly favorable response from the users of our services to the changes we have initiated, and a strong sense of purpose and direction as we look to the future. None of this would have been possible without the dedicated efforts of our staff, neutrals and board of directors, and I offer each of them my heartfelt personal thanks.

/s/ William K. Slate II
William K. Slate II

President and Chief Executive Officer

Excerpts from
American Arbitrators Association,
A Guide for Commercial Arbitrators

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

Excerpted from American Arbitration Association, **A Guide for Commercial Arbitrators**:

Page 24:

No Written Opinion Is Required

Commercial arbitrators are not required to explain the reasons for their decisions. As a general rule, the award consists of a brief direction to the parties on a single sheet of paper. One reason for brevity is that written opinions might open avenues for attack on the award by the losing party.

Courts will not review arbitrators' decisions on the merits of the case, even where the conclusions are different from those that a court might reach. But a carelessly expressed thought in a written opinion could afford an opportunity to delay enforcement of the award. The obligations to the parties are better fulfilled when the award leaves no room for attack. In situations where you feel it necessary to write such an opinion, it should be contained in a separate document.

Page 26:

Postaward Communications from the Parties and/or Their Representatives

On occasion, a party or its representative will call an arbitrator after the award is issued, seeking an explanation of the decision. It is a poor idea to talk at all. Instead, refer the party or attorney to the AAA. One reason why an arbitrator should not answer these questions is that the award could still be subject to enforcement proceedings in court. A party might try to impeach the award by getting the arbitrator to divulge his or her reasoning or thought processes. Another reason is that,

in rare instances, all or part of a case is remanded to the arbitrator for further consideration. You could be "tainted" by having had direct *ex-parte* communications with one party. Pursuant to the Code of Ethics for Arbitrators in Commercial Disputes, you are required to wait a "reasonable" period following the conclusion of the case before entering into any relationship with individuals involved in the arbitration.

Relevant Portions of Record

Toys "R" Us

July 20, 1992

Yusuf Ahmed Alghanim & Sons W.L.L.
Shuwaikh Industrial Area
Alghanim Headquarters Building
P.O. Box 223, Safat, Kuwait

Attention: Mr. Kutayba Y. Alghanim

Dear Sir:

Reference is made to the Supply Agreement ("Supply Agreement") dated November 16, 1982 by and between TRU (HK) Limited and Yusuf Ahmed Alghanim & Sons W.L.L. ("Alghanim") and the License and Technical Assiatance Agreement ("License and Technical Assiatance Agreement") dated November 16, 1982 by and between Toys "R" Us, Inc., TRU (HK) Limited and Yusuf Ahmed Alghanim & Sons W.L.L. (TRU (HK) Limited and Toys "R" Us, Inc. shall be collectively referred to herein as TRU) (the Supply Agreement and License and Technical Assistance Agreement shall be collectively referred to as the "Agreements"). Please be advised that:

(1) Pursuant to Section 5.01 of the Supply Agreement and Section 8.01 of the License and Technical Assistance Agreement, the respective Agreements shall expire on January 31, 1993 based upon the most recently opened YAAS Toy Store (as that term is defined in the Agreements) in Al-Rihab the week ending January 22, 1988.

(2) Accordingly, this letter shall serve as notice on behalf of TRU not to renew the Agreements.

Very Truly Yours,

TOYS "R" US, INC.

By: /s/ Louis Lipschitz
Name: Louis Lipschitz
Title: Vice President - Finance
Assistant Secretary
TRU (HK) LIMITED

By : /s/ Louis Lipschitz
Name: Louis Lipschitz
Title: Director

Yusuf Ahmed Alghanim & Sons W.L.L.

Toys 'R' Us, Inc.
and TRU (HK) Limited
461 From Road Paramus
New Jersey 07652
USA

July 30, 1992

FAX: (201) 262-8343

Attn: Mr. Louis Lipschitz
Vice President - Finance

Dear Sirs:

We hereby acknowledge receipt of your letter dated July 20, 1992 in which you serve us notice of your intention not to renew the Supply and License and Technical Assistance agreements dated November 16, 1992 ("the agreements") on the grounds that the most recently opened YAAS toy store in Al Rihab was during the week ending January 22, 1988 and that under Articles 8.01 and 5.01 of the agreements, they shall both expire on January 21, 1993, being 5 years pursuant to the opening of the Al Rihab toy store.

We regret to advise you that your notice has not been served in due course under the agreements since Al Rihab YAAS toy store was opened on Saturday, January 16, 1988 and thus the agreements are effective until January 16, 1993 and are automatically renewable under the said articles 8.01 and 5.01 unless either party shall give the other notice of its intention not to so renew not less than 6 months prior to the expiration of the initial term in effect.

Since the said notice was given later, the agreements have been automatically renewed under the provisions of the aforementioned articles.

Yours truly,

/s/ Amin Kadrie
Amin Kadrie
Executive Vice President &
Chief Operating Officer

PLAINTIFF'S EXHIBIT
60

PO Box 223 Safat 13003 Safat Kuwait Telex 44900 145
Ganm Fax 484?244 Te [illegible]
CAPITAL KD 2,000,000 -COMMERCIAL REG NO 5744

Toys "R" Us

NATIONAL OFFICES: 461 FROM ROAD,
PARAMUS, NJ 07652
(201) 599-7880

VIA HAND DELIVERY
AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 2, 1992

Yusuf Ahmed Alghanim & Sons, W.L.L.
Shauvaik Industrial Area
Alghanim Headquarters Building
P.O. Box 24172
Safat, Kuwait

Attention: Mr. Amin A. Kadrie Executive Vice President and Chief Operating Officer

Re: License and Technical Assistance Agreement and Supply Agreement

Dear Amin:

Reference is made to the License and Technical Assistance Agreement (the "L & T Agreement") dated November 16, 1982 between Toys "R"Us, Inc. ("Toys"), TRU (HK) Limited ("Toys-HK") and Yusuf Ahmed Alghanim & Sons, W.L.L. ("YAAS"), and the Supply Agreement (the "Supply Agreement") dated November 16, 1982 between Toys-HK and YAAS. (The L & T Agreement and the Supply Agreement are referred to herein as the "Agreements"). Furthermore, we acknowledge receipt of your letter of July 30, 1992 advising us that your most recent store opened on January 16, 1988, and of the automatic renewal of the L & T Agreement in response to our letter of July 20, 1992.

We have since had the opportunity to consider the termination provisions of Section 8.01 of the L & T Agreement and, in particular, the use of the term "calendar year" (which is defined by Section 1.02 as a Gregorian calendar year ending on

the 31st of December). Based on your letter and such definition, we have concluded that if you have otherwise complied with all terms of the L & T Agreement, the initial term of the L & T Agreement (and the Supply Agreement) expires on December 31, 1993. Accordingly, we hereby give you notice pursuant to Section 8.01 of the L & T Agreement and Section 5.01 of the Supply Agreement that we intend not to renew the Agreements for additional terms beyond December 31, 1993.

We further direct YAAS to cease any efforts to open any new YAAS Toys Store in the territory (as defined by the L & T Agreement), to otherwise perform fully its obligations under the Agreements and to provide the undersigned with all amounts past due and all reports and documents supporting YAAS's computation of amounts due. Without limiting the foregoing, you should promptly provide us with a record of all YAAS Toys Store sales since reopening and concurrently remit all fees due pursuant to Section 5 of the L & T Agreement.

Failure to comply with the Agreements or with this letter may constitute grounds, among other remedies that we may have, for recession or termination of the Agreements prior to December 31, 1993, pursuant to Section 8.02 of the L & T Agreement and Section 5.02 of the Supply Agreement.

PLAINTIFF'S EXHIBIT

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Very Truly Yours,

TOYS "R" US, INC.

By: /s/ Louis Lipschitz
Name: Louis Lipschitz
Title: Vice President - Finance and Treasurer

TRU (HK) LIMITED

By : /s/ Louis Lipschitz
Name: Louis Lipschitz
Title: Director

MLT:jg/2230T

CONTACT REPORT

Meeting between ALGHANIM INDUSTRIES and TOYS R US on Thursday, September 5, 1991, 9:00 a.m. at TOYS R US ofices in New Jersey.

Present:	Larry Bouts - President	TOYR R US
	Phil Bloom - V.P. Merchandising	INTERNATIONAL
	Don Margolis - V.P./Controller	DIVISION
	Amin Kadrie	ALGHANIM
	Amal Haddad	INDUSTRIES

I. AAK started the meeting with a presentation on Alghanim Industries:

1.1 A brief introduction to AI activities and organization pre-invasion. This was to the benefit of Larry Bouts who has joined TRU during the invasion period.

1.2 A summary of actions taken by AI during the invasion period:

A. Forming a crisis management committee to handle

* Human Resources: 85% of the management was retained. Suppliers were contacted to hire some of the employees.

* Inventories, particularly en-route shipments.

B. Setting up offices in Saudi, Dubai, New York and Washington to handle outstanding issues.

C. Working closely with Kerb and providing medical supplies and cars to the Kuwaiti Government.

D. Meeting with suppliers to discuss and explain reconstruciton plans.

E. Developing new business ideas and acquiring new products e.g. AT&T.

1.3 A discussion on AI's action plans and implementation post liberation.

* Opened the business on Feb. 28, 1991.
* 500 people started to work. The number is growing to reach 3500 by end 1991.
* Booked claims on insurance companies upon damage assessment by international companies.
* Re-scheduled debts with suppliers, who were all very suporting (with the exception of TRU).
* Booked new orders with suppliers and started to receive goods. Expect a total buying figure of 1 Billion next year.
* Set up a business development center and signed a representation agreemnet with Booz Allen.
* Appointed a new COO, who is now organizing the structure to handle the various business diversifications:
  - Trading: with GM/Phillips/Xerox/AT&T, etc.
  - Manufacturing: Insulation material/Water Coolers/Kirby
  - Joint Ventures: Spinney's/Morrison Knudsen
* Delegated management in some areas to people with technical expertise from our partners.

As a result, most relationships benefited and AI gained a big market share.

Now the company possesses a new and modern management style and is proceeding with strong regional plans.

II. AAK discussed particulars of the Toys business.

1.1 AI's toys business has not been successful in the past and profitablility was unsatisfactory to both parties. Three options could be verified:

* Terminate the agreement.
* Stay in confinement and make it work.
* Recognize past errors and the success of TRU and propose a change of course plan which was being discussed just before the invasion.

1.2 AI's proposal for a joint venture with TRU.

* Keep and restock the two stores open new (Salmiya & Fahaheel).
* Second somebody from TRU to work with Amal on JV plans and capitalization of the new company.
* Learn from TRU how TRU's JV's are working.
* Open Dubai the fall of 1992 and Saudi by beginning 1993.

AI believes that the Middle East market has potential. One could look at 15 to 20 toy stores in the region generating between 45 to 60 Million Dollars annual sales. In Kuwait, AI sees a good opportunity today due to the following reasons:

* The major market operators are out now, and many will not return, giving AI a competitive edge.
* The expatriate population is growing.
* the politics and the culture are pro-American.

The above, coupled with AI's regional plans result in a promising future for the toys business in the area.

In addition, AI is convinced that the way the business was done was wrong and has already taken steps to rectify the situation. The decision-making has been delegated to AAK and his staff and full time was dedicated in the past two months to reconcile the accounts.

III. TRU's opinion was presented by Larry Bouts.

1. Kuwait invasion had a recessionary impact on the business last year.

2. TRU had concerns about the people in Kuwait and TRU's staff who were sent to the Gulf during the war.

3. TRU had serious concerns on the financial exposure from the Kuwait operation, and hence could not allow additional debts by AI to TRU or to its suppliers.

4. TRU wants to know when will the payment be made by AI.

AAK then explained that such an issue can be settled once the outstanding amounts are known, especially that more billings had just arrived the day before the meeting. TRU agreed that any bills presented after Friday the 13th. of September will be considered void, and that AI will be allowed one month thereafter, to verify all amounts.

TRU discussed their expansional plans in international markets.

* Devoted resources from International and U.S. divisions to Japan. The first stores will open and of this year and are planned to grow into 150 stores in a 6 Billion Dollar market.

* In Spain, TRU will open soon 8 stores.

* TRU's focus of attention is in fairly legitimate and stable countries. TRU will figure a way of being in the Middle East but does not have the answer readily available.

CONCLUSIONS

AAK suggested, and Toys R Us agreed to the following interim steps to start immediately:

1. AI to remain in the business in Kuwait and maintain a good image by stocking products immediately.

2. Amal to work in TRU's offices to prepare and book orders through TRU. Work to commence on Wednesday, September 10th.

3. AI to prepare a brief study on the regional markets to satisfy questions by TRU on critical market elements such as:

   * Population and demographics
   * Income levels
   * Birth rates
   * Educational levels
   * Retail market prices
   * Competitive profile - supply and operations

   TRU explained that their average store in Singapore or Canada generates 7 Million Dollars sales which is a reasonable level for profitability, and turn over inventories 2 to 2 1/2 times a year.

4. TRU & AI will meet again in three months to evaluate the M.E. selective markets and discuss further action.

5. Reconciliation of accounts to continue after submission of all outstanding bills by TRU and verification of receipt of merchandise by AI in Kuwait pre-invasion to proceed. Issue to be looked at again by mid October.

Meeting was adjourned at 11:45 a.m.

TOYS :RETAIL **FINANCIAL SUMMARY**

	1983	1984	1985	1986	1987	1988	1989	1990	1991	YTD JUNE 1992	YTD JUNE 1993	TOTAL 1983-93
NET SALES	422	1059	1107	1208	1166	1389	1471	847	464	647	391	10171
GP AFT VSE	169	371	411	531	533	598	513	295	184	253	146	4004
G MARGIN %	40.0%	35.0%	37.1%	44.0%	45.7%	43.1%	34.9%	34.8%	39.7%	39.1%	37.3%	39.4%
OVERHEADS	349	801	739	684	631	717	747	394	101	201	118	5482
OPR PROFIT	(180)	(430)	(328)	(153)	(98)	(119)	(234)	(99)	83	52	28	(1,478)
FINANCE COS	5	106	71	41	23	38	61	30	6	20	10	411
NET PROFIT	(185)	(536)	(399)	(194)	(121)	(157)	(295)	(129)	77	32	18	(1,889)

RESPONDENT
EXHIBIT
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31-Jul-93

Excerpted from the direct examination testimony of Amin Kadrie:

Page 121:

Q. When was the first Alghanim toy store opened?

A. In November 1993.

Q. Do you mean 1983?

A. Sorry, '83. Wrong year.

Q. Where was that store opened?

A. It was opened up in Farwaniah....

Page 125:

Q. What was the name of the Farwaniah toy store?

A. Kids "R" Us.

Pages 127–128:

Q. When was the next toy store open?

A. In April 1985, approximately.

Q. Where was it opened?

A. In Salmiya which is the largest and highest volume commercial district in Kuwait.

Q. And this was also called Kids "R" Us?

A. Yes.

Q. Were all of the stores that Alghanim opened Kids "R" Us stores?

A. Yes.

[text omitted]

Q. When was the next toy store opened?

A. I believe it was December, approximately December 1985.

Q. And where was that store opened?

A. It was opened in a city called Fahaheel which is a city of about 150,000 people towards the Saudi border.

[text omitted]

Q. When was the next store opened?

A. In January 1988 the Rihab store which was in, I guess, described geographically, another commercial section of Kuwait City.

Pages 130–31:

Q. Did Alghanim open any other Kids "R" Us toy stores in Kuwait?

A. No.

[text omitted]

Q. Did Alghanim open any toy stores outside of Kuwait?

A. No.

Q. Why not?

A. Prior to 1989 there was expansion taking place in Kuwait that was adequate expansion and in 1989 when we reviewed the business extensively, we were concerned about the profit and loss of the business, and prior to expanding outside Kuwait we wanted to have an extensive review with TRU to properly plan ourselves for the expansion and to review the profit and loss.....

Excerpted from the cross-examination testimony of Amin Kadrie:

Page 358:

Q. And would you agree with me, sir, that if you accumulate all of the years 1983 through 1993, you end up with a cumulative loss of just under 1.9 million Kuwaiti dollars?

A. Yes, I would agree.

Q. And that includes the three years in which there was a small profit, as defined in these terms?

A. Yes.

Page 363:

Q. Sir, is it correct that at a meeting with Toys "R" Us representatives on September 5, 1991, in Paramus, New Jersey, you told them that Alghanim's toy business has not been successful in the past, and profitability was unsatisfactory to both parties?

A. Yes, I did.

Is there anything else from this?

Q. Not from that document at this time, sir.

Can we also agree, Mr. Kadrie, that throughout Alghanim Industries' relationship with Toys "R" Us, up until this day, the only toy stores which Alghanim has opened are the four toy stores that were opened on or before January 16 of 1988?

A. January 16 -- that's correct.

Q. And is it fair to say, sir, that Alghanim has not opened any toy stores since then?

A. That's correct.

Page 438:

Q. Other than the Jahra store which you chose not to open and the Farwaniah rebuilt store which you chose not to open, as of September 2nd, 1992 had Alghanim selected any additional sites for possible new toy stores?

A. As of what date?

Q. September 2nd, 1992.

MS. RICE: Could you repeat the question.

(Requested portion of record read.)

A. As of September 2nd?

Q. Yes.

A. Specific sites?

Q. Yes.

A. To my knowledge, we identified areas, but we didn't identify specific sites.

Q. Now, sir, it takes some time, does it not, to get a store ready to open?

A. Yes, it does.

Excerpted from the cross-examination testimony of
Keith Van Beek:

Pages 3252–53:

Q. Mr. Van Beek, did Mr. Kadrie in your discussion in Toronto quantify for you an amount that he characterizes Alghanim operating losses to date in the toy business?

A. $2 million.

Q. Did that, to your knowledge, include the value of the inventory or was that over and above the value of the inventory?

A. I couldn't say.

Q. And so the overall package that Mr. Kadrie described in relation to getting out of the toy business, was that figure $2 million?

A. Yes.

THE ARBITRATOR: What did you understand he meant by getting out of the toy business?

THE WITNESS: He explained to me that they were no longer interested in being in the toy business and that he wanted to get out of the Salmiya building because it had this large key money value and he knew that we were going to end the agreement. When he said to me we think that -- we'll be happy to release the business right now, Alghanim thinks you should give us $2 million for the losses we've incurred for trying to develop this business, my understanding of that was that they weren't interested any more, they weren't going to pursue it and they were interested in getting out of the toy business.

[text omitted]

Excerpted from the direct testimony of Amal Haddad:

Page 3697:

Q. Following the March 1988 meeting, did Alghanim discuss implementing any of the changes that were recommended by Mr. Baczko?

A. I remember when we went back to Kuwait following that meeting discussions on the computer system took place and there was a general — a decision by the Alghanim executive committee that that investment was too high and that Alghanim was not willing to make the investment in the computer system.

Pages 3808–10:

Q. Ms. Haddad, between January, 1992 and April 28th, 1992, had Alghanim placed any orders for the industrial buying function necessary to equip a new store in a new location in Kuwait City for a January 1993 opening?

A. No.

Q. Between January 1992 or the time you prepared your business plan, and April 28th, 1992, had Alghanim ordered the computer systems and information systems support necessary to support a Toys "R" Us conforming store for the new location scheduled for Kuwait City in January 1993?

A. No.

Q. Between January 1992 and April 28th, 1992, did Alghanim take any steps towards establishing the store that you project as being possible in Exhibit number 955?

A. Not to my knowledge.

Q. Ms. Haddad, between April 28th, 1992 and September 2nd, 1992, did Alghanim take any of the steps that we've discussed before towards establishing a new toy store in Kuwait City in January 1993?

[colloquy omitted]

A. I don't recall any steps were taken between April and September.

(2)

Supreme Court, U.S.
FILED
JAN 23 1998
CLERK

No. 97-957

In The

Supreme Court of the United States

October Term, 1997

TOYS "R" US, INC. and TRU (HK) LIMITED,

Petitioners,

vs.

YUSUF AHMED ALGHANIM & SONS, W.L.L.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH D. PIZZURRO
Counsel of Record
HERBERT M. LORD
MICHELLE A. RICE
CURTIS, MALLET-PREVOST,
COLT & MOSLE
101 Park Avenue
New York, New York 10178-0061
(212) 696-6000

Attorneys for Respondent

144255

(800) 274-3321 • (810) 359-6859
A DIVISION OF COUNSEL PRESS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court should consider an argument which petitioner never presented in the courts below, *i.e.*, that a new standard of review, the clearly erroneous standard, should be applied by courts reviewing international arbitration awards.

2. Whether the Supreme Court should adopt a judicially intrusive clearly erroneous standard for the review of international arbitral awards notwithstanding thirty years of judicial authority, clear statutory provisions and Federal policy favoring international arbitration.

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceedings.

Respondent Yusuf Ahmed Alghanim & Sons, W.L.L. (hereinafter "YAAS") is a privately held company. It has no parent companies or nonwholly owned subsidiaries or affiliates.

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STATEMENT OF THE CASE

This case presents what should be a routine and expeditious enforcement of an international arbitral award under the terms of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), a treaty ratified and implemented by the United States. 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3 (codified at 9 U.S.C. §§ 201-208). Petitioners, Toys "R" Us, Inc. and TRU (HK) Limited (collectively "TRU") initiated the arbitration pursuant to the terms of an arbitration agreement contained in contracts which TRU drafted. The arbitration, which lasted two and one-half years from the time TRU commenced proceedings in December 1993, involved extensive pre-hearing document discovery, 29 days of evidentiary hearings resulting in more than 5,000 pages of transcript, 800 documentary exhibits, extensive expert testimony and written reports on damages, and post-hearing submissions of over 300 pages. The experienced AAA arbitrator, William L.D. Barrett, issued a thorough and reasoned 47 page memorandum opinion addressing all of TRU's evidentiary, contractual and legal arguments. That memorandum opinion, which would withstand scrutiny under any standard of review, rejected TRU's arguments and awarded YAAS $46.4 million in damages, plus prejudgment interest at the statutory rate provided under New York law, based principally upon an analysis of what TRU actually was able to secure for itself when it sold the contract rights which were found to belong to YAAS (the "Award").

TRU refused to honor the Award, forcing YAAS to petition the District Court for recognition and enforcement under the Convention. In the District Court, and in the Court of Appeals, TRU argued that the Award should be overturned because the arbitrator had manifestly disregarded the applicable law and because the Award was completely irrational. These arguments were nothing more than attempts by TRU to retry the arbitration in the courts. The District Court confirmed the Award and the Court of Appeals for the Second Circuit affirmed.

TRU now seeks review by this Court, but not on the grounds that the Court of Appeals committed reversible error by failing to properly apply the existing law laid down by this Court. Rather, TRU argues for the first time that the standard of review which it sought to have applied by the courts below should now be changed to permit courts to refuse recognition and enforcement of international arbitration awards if those awards are "clearly erroneous."

TRU's assertion is at odds with the statutory framework established by Congress for the enforcement of arbitral awards. It is at odds with the prior decisions of this Court and all of the decisional law of the circuit courts of appeals. It is at odds with the overriding Federal policy in favor of arbitration, a policy which applies with particular force in the international arena. And it is premised on a fundamental mistrust of arbitration as an institution — a mistrust which this Court has repeatedly stated is at odds with modern law and policy. The Court of Appeals decision was correct and the petition for a writ of certiorari should be denied.

A. The Facts

In 1982, YAAS entered into a License and Technical Assistance Agreement (the "L&T Agreement") and a Supply Agreement (collectively, the "Agreements") with TRU with the intention of establishing and operating toy stores throughout the Middle East, a territory which included Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Oman, Bahrain, Yemen, Egypt, Sudan, Jordan, Lebanon, Syria, Iraq and Iran (the "Territory"). (A19, 80).[1] The Agreements were broad and far reaching. YAAS was granted the exclusive right to use all of TRU's trademarks and logos in

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1. References in the form "A__" are to the relevant pages of the Petitioners' Appendix. References in the form "RA__" are to the relevant pages of the Respondent's Appendix. References in the form "__ Tr. __" are to transcripts in the Record. References in the form "Petition at __" are to the petition for certiorari filed by TRU.

connection with the operation of the YAAS toy stores and was provided with exclusive access to all of TRU's know how, technology and expertise regarding all aspects of the retail toy business. In addition, the L&T Agreement obligated TRU to use its best efforts to make the YAAS Toy Store business profitable. (A19-20, RA6).

The Agreements also contemplated that YAAS could enter into partnerships with third parties to operate YAAS toy stores in the Territory, and that TRU would be required to provide the same rights and assistance with respect to those stores as to stores operated by YAAS alone. (A19, RA4).

The Agreements contained "Term and Termination" clauses which provided for the extension of the Agreements as long as YAAS opened a YAAS Toy Store every five or fewer years. (A21-22, 82).

Within months of executing the Agreements, YAAS invested substantial funds to start up and operate the toy business in Kuwait. Toy stores were opened in November 1983, April 1985, December 1985 and January 1988. (A4, 106-107). YAAS ordered, and TRU provided, merchandise for these stores. (A27). TRU only provided technical advice and assistance to facilitate the opening of the first store. YAAS nevertheless paid royalty and purchasing commissions for all of the stores. (A22, RA6-7).

Without the assistance of TRU, the toy stores were not profitable. To rectify the situation, in 1989, Amin Kadrie of YAAS conducted an extensive review of the toy operations and reached the conclusion that it was feasible to expand the toy business outside of Kuwait. Realizing that YAAS needed TRU's performance under the Agreements to make the existing stores profitable and to open additional stores in the Territory, Kadrie asked TRU for its assistance. But TRU refused to send a representative to Kuwait in response to Kadrie's request. Kadrie nonetheless concluded that

YAAS should remain in the toy business and that expansion of the business within the region presented a "very significant opportunity" for YAAS. (A30).

On August 2, 1990, before YAAS could turn around its operations and implement an expansion plan, Iraq invaded and occupied Kuwait. The country sustained major damage during the occupation. The many businesses operated by Alghanim, including the YAAS toy business, ground to a halt. One of the toy stores was burned to its foundation. Two other stores suffered severe fire and structural damage. All of the stores were looted, and tens of millions of dollars in inventory and equipment were destroyed. (A30).

Despite the devastation in Kuwait, YAAS quickly resolved to restore its operations after the liberation. In April 1991, YAAS notified TRU of its intention to reconstruct and operate the toy business. (A31). But, unbeknownst to YAAS, TRU had already concluded that the Middle East had enormous potential for development and that "YAAS's [exclusive] Agreements were blocking TRU from a gold mine." (A23). Indeed, by April 1991, TRU decided that the Agreements had to be terminated so that TRU could "have a free hand in the Territory." (A27). Certain, however, that YAAS would not voluntarily abandon its valuable rights under the Agreements, TRU devised a strategy "to stall, stonewall and obstruct YAAS while the clock ran out and the Agreements ended under their termination clauses." (A25).

Unaware of TRU's intentions, YAAS took a number of steps to restore and expand its toy business. YAAS reopened the one store that was mostly intact after the Gulf War. (A31). To accomplish a regional expansion, YAAS investigated sites for additional stores in Kuwait, the United Arab Emirates and Saudi Arabia. (A31-32).

In March 1992, Kadrie also determined that YAAS should reestablish its flagship store in Farwaniya, Kuwait which had been destroyed during the War. In May 1992, after TRU informed YAAS that TRU did not have the resources or interest to pursue a Middle

East expansion plan, a cost analysis of the Farwaniya project was prepared by YAAS. In July 1992, YAAS prepared an investment proposal, projecting a store opening by December 1, 1992. That proposal was approved by top management at YAAS in mid-July 1992, and YAAS notified TRU that it intended to proceed in accordance with the terms of the existing Agreements between the parties and that it would "pursue its 'immediate plans and priorities' — which included a plan to open stores in at least one more country." (A33).

On July 20, 1992, before YAAS could open a store, TRU issued a notice of termination, advising YAAS that the Agreements would expire on January 31, 1993. (A94-95). However, TRU soon learned from YAAS that its notice of termination was not timely, and that YAAS refused to relinquish its rights in the Territory. (A96-97). Therefore, TRU rethought its initial interpretation of the termination provisions and issued a second notice of nonrenewal that revised the expiration date to December 31, 1993. (A98-99).

But by solving one problem TRU created another: If the expiration date of the Agreements became December 31, 1993, YAAS would have 11 more months to open a store and automatically extend the Agreements for another five years. To prevent that, in early September, TRU "direct[ed] YAAS to cease any efforts to open any new YAAS Toy Stores in the territory . . ." (A99). TRU then threatened that a failure to heed that instruction could constitute grounds for an immediate termination of the Agreements and could subject YAAS to liability for monetary damages. (A99).

While the Agreements were still in effect, TRU sold the rights to the TRU trademarks and TRU's technical assistance and expertise — rights which belonged to YAAS — for six of the 14 countries in YAAS's Territory. Under these agreements, the two new franchisees, ATA Development Co. ("ATA") and Al-Futtaim Sons Co. LLC ("Al-Futtaim"), agreed to pay upfront fees of $30 million

and royalty and purchasing commissions based on the future operation of the new toy stores. (A28, 35). Under the Agreements with YAAS, TRU was entitled to royalty and purchasing commissions but was not entitled to any upfront fees.

B. The Proceedings Below

1. The AAA Arbitration

On December 20, 1993, TRU commenced an arbitration against YAAS, seeking a declaration that the Agreements would terminate on December 31, 1993. In response, YAAS counterclaimed for damages for breach of the Agreements. (A11).

On May 4, 1994, the arbitrator issued an eight page Partial Award, denying TRU's request for a declaratory judgment. (A1-9). The arbitrator found that under the termination provisions of the Agreements YAAS had the absolute right to open toy stores, even after a notice of termination, as long as the toy store was opened within five years of the last store opening. In that event, the Agreements by their terms would be extended for at least five more years. The arbitrator further held that, depending upon the proof submitted in subsequent evidentiary hearings, the initial term of the Agreements might be extended and the Agreements might have a longer term. (A8-9).

After the Partial Award was issued, the parties engaged in document and expert discovery, the exchange of Evidentiary Statements and motion practice. Thereafter, evidentiary hearings were held on the counterclaims asserted by YAAS. The hearings commenced in October 1994 and concluded in December 1995. After the hearings, the parties submitted extensive main briefs, reply briefs and proposed findings of fact and conclusions of law. Oral argument was held on May 7, 1996.

On July 10, 1996, the arbitrator rendered an Award, holding that TRU is obligated to pay YAAS $46,400,000 plus pre-Award interest thereon at the New York statutory rate of 9% per annum from December 31, 1994 through the date of the Award. (A48-49). The arbitrator also issued a 47 page memorandum in support of the Award in which he addressed each and every legal and factual issue arguably relevant to the arbitration. (A10-47).

2. The District Court Proceedings

On August 2, 1996, after TRU notified YAAS that it would not honor its payment obligations under the Award, YAAS filed a petition to confirm the Award under the Convention. TRU cross moved to vacate the Award, advancing three purported defenses to confirmation: (i) the arbitrator disregarded several provisions of the Agreements; (ii) the Award was rendered in "manifest disregard of the law;" and (iii) the Award was "completely irrational."

On December 13, 1996, the District Court issued a memorandum and order confirming the Award and denying TRU's cross motion to vacate or modify the Award. (A50-55). The District Court held that none of the limited grounds for vacating an arbitral award available under the Convention, or the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, had been established by TRU. (A51-52, RA1-4).

3. The Court of Appeals Proceedings

On December 19, 1996, TRU appealed the District Court's ruling on the same grounds that it had advanced in support of its motion to vacate or reduce the amount of the Award. YAAS opposed TRU's appeal, arguing that the FAA's implied grounds for vacatur — "clear irrationality" and "manifest disregard of the law" — were not applicable to an Award falling under the Convention. YAAS argued further that, even if such defenses were applied, the Award would have to be upheld and the District Court affirmed.

On September 10, 1997, the Court of Appeals issued an opinion and order affirming the District Court's confirmation of the Award. (A56-75). The Court of Appeals held that the FAA implied defenses of "manifest disregard of the law" and "clear irrationality" are not available under the Convention for international arbitral awards rendered in, or under the law of, a foreign jurisdiction. (A64). The court conversely held that, for international arbitral awards rendered in or under the laws of the United States, such as the Award at issue, the domestic arbitration laws and their implied defenses do apply. (A66). Applying those defenses, the Court of Appeals then carefully considered and swiftly rejected TRU's contentions, and held that the Award had not been rendered in manifest disregard of the law or in manifest disregard of the terms of the Agreements, and was not clearly irrational. (A70-75).

REASONS FOR DENYING THE WRIT

The petition's contention appears to be that courts should scrutinize international arbitral awards under a "clearly erroneous" standard of judicial review. (Petition at 14). That contention does not warrant consideration by this Court.

First, TRU asserts this argument for the first time in this Court. Absent compelling circumstances, which do not exist in this case, the Court should not consider arguments that were not presented and preserved in the lower courts.

Second, the existing more restrictive standard for vacatur of foreign arbitral awards is firmly rooted in 30 years of settled law and is, contrary to TRU's assertions, consistently applied in all of the circuits. Indeed, the standard advocated by TRU is beyond the authority granted by Congress for the review of arbitral awards.

Third, the arbitrator dealt exhaustively with the myriad arguments raised in the petition by TRU in the Partial Award and Memorandum supporting the final Award. His interpretations of

the contract, findings of fact and legal analysis not only were supported by the record before him, they were clearly correct. Thus, even under the novel standard of review proposed by TRU, the Award issued in favor of YAAS would have been confirmed by the District Court and upheld by the Court of Appeals.

Respondent respectfully requests that the Court decline to exercise jurisdiction and deny TRU's petition for a writ of certiorari.

I.

TRU SHOULD NOT ASSERT AN ARGUMENT FOR THE FIRST TIME IN THIS COURT.

In its petition for certiorari, TRU argues that the lower courts should have independently reviewed the merits of the dispute between the parties to the arbitration under a "clearly erroneous" standard of review. (Petition at 16). This argument was not asserted expressly or implicitly in either the District Court confirmation proceedings or in the Court of Appeals. Indeed, in both proceedings, TRU asked the courts to review the arbitrator's findings to determine whether he had manifestly disregarded New York's law of lost profits, manifestly disregarded the terms of the Agreements or made findings of fact on damages that were completely irrational. (A51, 73-75). It is only because those arguments failed that TRU now urges a different standard of review, a standard which has never been applied by a United States court reviewing an arbitral award.

This Court generally has declined to consider matters that were not presented and preserved in the lower courts in the absence of compelling or extraordinary circumstances. *See, e.g., Davis v. United States*, 495 U.S. 472, 489 (1990) (because the agency argument was "neither raised before nor decided by the Court of Appeals, we decline to address it here"); *Patrick v. Burget*, 486 U.S. 94, 100 n.5 (1988) (Court refused to consider evidentiary

issue not passed upon by the lower court); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (because defendants had failed to raise in the Court of Appeals the issue as to whether denial of their costs was an abuse of discretion, the issue was not properly before the Supreme Court).

This case clearly does not present the type of extraordinary circumstances which this Court has deemed to be sufficient to override this prudential limitation. *Cf. Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980). *See generally* Robert L. Stern & Eugene Gressman, *Supreme Court Practice* § 6.27 (5th ed. 1978) ("the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings"). TRU has not alleged, and cannot demonstrate, that a fundamental unfairness in the proceedings will result if this Court declines to consider its new argument. Indeed, TRU does not even contend that there was error — much less serious error — in the courts below; it simply argues that the award would have to be overturned if, and only if, a clearly erroneous standard of review were applied to the contract interpretation and findings of fact made by the arbitrator. (Petition at 17).

TRU's new argument should not be considered for the first time in this Court. The petition should be denied.

II.

A CLEARLY ERRONEOUS STANDARD OF REVIEW IS AT ODDS WITH THE PRIOR DECISIONS OF THIS COURT AND THE COURTS OF APPEALS AS WELL AS APPLICABLE STATUTES AND FEDERAL POLICY FAVORING ARBITRATION.

Obviously disappointed with the results of the arbitration and the decisions of the courts below which correctly applied existing law, TRU now argues that the Court should jettison the well

established principle of limited judicial review of arbitral decisions in favor of a new standard of review. (Petition at 16). TRU justifies this radical departure from existing law with the twin assertions that arbitration has become increasingly lawless and that there is division among the Circuit Courts concerning the manifest disregard of the law standard of review. (Petition at 10-11). Both assertions are baseless.

TRU's claim that arbitrators are incapable, and perhaps even unwilling, to accurately apply the law has no empirical support. Not only is it manifestly false, it is premised on the same mistrust and suspicion of the arbitral process that this Court has explicitly rejected. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), it was asserted that claims arising out of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 were not arbitrable because these statutory rights implicated complex legal principles that arbitrators would have difficulty in applying. Indeed, this had been an underpinning of this Court's original decision in *Wilko v. Swan*, 346 U.S. 427 (1953), which held that claims arising under the Securities Act of 1933 were not arbitrable. The Court rejected those assertions, stating:

> It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* [473 U.S. 614 (1985)] [citations omitted]. Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. *See* 473 U.S., at 633-634. Likewise, we have concluded

> that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. *Id.*, at 628. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to insure that arbitrators comply with the requirements of the statute.

482 U.S. at 231-232. The Court went on to state, "the mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time." *Id.* at 233. Thus, TRU's assumption that a new stricter standard of review is necessary to insure that arbitrators comprehend and follow the law in international disputes has already been resolved by this Court.

TRU's assertion that there is a split and confusion among the Circuit Courts of Appeals concerning the standard of review to be applied to arbitral decisions also is without merit. Eleven out of the twelve Courts of Appeals have recognized that "manifest disregard of the law" by the arbitrator is an appropriate reason to vacate an arbitral award. In addition, these courts are consistent in formulating the standard, *i.e.*, that the arbitrator's decision must constitute a conscious disregard of a recognized controlling legal principle rather than a mere error of law. *See Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234 (CA1 1995) (arbitrator's finding that executives of brokerage house had been wrongfully discharged was not in manifest disregard of the law and therefore award was confirmed); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (CA2 1997) (arbitrator's finding that licensee was not entitled to benefits under most-favored-licensee clause in agreement was not in manifest disregard of the law and should have been confirmed); *United Transport Union, Local 1589 v. Suburban Transport Corp.*, 51 F.3d 376 (CA3 1995) (district court's vacatur of award reversed as arbitrator's

decision to reinstate bus driver involved in multiple accidents was not in manifest disregard of the law); *Upshur Coals Corp. v. United Mineworkers of America, Dist. 31*, 933 F.2d 225 (CA4 1991)[2] (district court's vacatur of award reversed because arbitrator's finding that employer must continue to pay accrued health benefits to laid-off employees after the expiration of the collective bargaining agreement was not in manifest disregard of the law); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844 (CA6 1996) (recognizing manifest disregard of the law as a rationale for reversal under the Federal Arbitration Act); *National Wrecking Co. v. International Brotherhood of Teamsters, Local 731*, 990 F.2d 957 (CA7 1993) (employer's motion to vacate arbitrator's finding that truck driver's vision met Department of Transportation minimum standards denied, as arbitrator's legal conclusions will not be disturbed absent manifest disregard of the law); *Lee v. Chica*, 983 F.2d 883 (CA8), *cert. denied*, 510 U.S. 906 (1993) (district court set aside arbitrator's award of punitive damages for violations of Securities Exchange Act and court of appeals reversed because award not completely irrational or in manifest disregard of the law); *Barnes v. Logan*, 122 F.3d 820 (CA9 1997) (arbitrator found against broker in dispute alleging mismanagement of customer's securities account and courts affirmed as they could only have set aside this finding if arbitrator manifested complete disregard of the law); *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co.*, 119 F.3d 847 (CA10 1997) (court of appeals would not overturn arbitrator's finding of liability in multi-train collision as judicial review of arbitration awards is among the narrowest known to the law and such awards may be overturned only on very limited grounds, including manifest disregard of the law); *Montes v.*

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2. TRU's statement that the Fourth Circuit has rejected the manifest disregard of the law standard, citing to *Remmey v. PaineWebber, Inc.*, 32 F.3d 143 (CA4 1994), *cert. denied*, 513 U.S. 1112 (1995) is mistaken. (Petition at 11). In fact, in *Remmey*, the Fourth Circuit made clear that manifest disregard of the law is an accepted ground for challenging an arbitral award, citing *Upshur Coals Corp.* as controlling authority for the proposition. 32 F.3d at 149.

Shearson Lehman Bros., Inc., 128 F.3d 1456 (CA11 1997) (employee's petition to vacate arbitration decision denying her claim for overtime pay granted because arbitrators recognized express request by employer's counsel to disregard the prevailing law); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680 (CADC), *cert. denied*, 117 S. Ct. 432 (1996) (arbitrator's award of $1.1 million to plaintiff in suit alleging breach of fiduciary duty was not in manifest disregard of the law and thus was upheld by court of appeals).[3]

The scope of judicial review of arbitral awards is consistent throughout the circuits. And contrary to the assertion of TRU (Petition at 16), the commercial world needs no clarification of that scope in order to make intelligent decisions about whether to submit controversies to arbitration. Anyone with a passing familiarity with the law of arbitration knows that judicial review of awards is narrow and limited. Indeed, as this Court recognized in *Mitsubishi*, a party which opts for arbitration knowingly "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 476 U.S. at 628.

The adoption of the new and intrusive scope of review advocated by TRU would create turmoil and uncertainty in the commercial world. TRU's clearly erroneous standard would transform arbitral tribunals into mini-trial courts whose findings would be subjected to rigorous judicial scrutiny. The courts concommitantly would be drawn into each arbitration, required to engage in an in-depth substantive review of the proceedings to determine if the arbitrator's contract interpretations and findings of

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3. Only the Fifth Circuit appears to have refused to adopt the manifest disregard standard as a *separate* basis for vacating an arbitral award, restricting the grounds available to those explicitly set forth in 9 U.S.C. § 10. *R.M. Perez & Associates, Inc. v. Welsh*, 960 F.2d 534, 539-40 (CA5 1992). However, we have found no case in which the Fifth Circuit has enforced an award in which the arbitrator acknowledged controlling law and declined to apply it.

fact and law are accurate.[4] The principle of finality of arbitral awards would be destroyed. The disruption would be particularly acute in the international commercial sphere. Foreign parties, which often agree to arbitration rather than submit themselves to the jurisdiction of United States courts, would now be faced with the injection of the United States judiciary into a process they previously viewed as more neutral. In sum, the standard advocated by TRU would undermine, not enhance, arbitration as an effective method of international dispute resolution.

The foregoing is sufficient to dispose of TRU's contention that the Court should consider changing the existing standard of review of arbitral awards. However, there is another significant reason to deny TRU's petition. The clearly erroneous standard of review cannot be supported by the governing statutory authority.

Congress has set out in the FAA a well established statutory scheme for the enforcement of arbitration agreements and arbitral awards. 9 U.S.C. § 10 sets out the available grounds for vacating an arbitral award.[5] (A79). Courts have some latitude in interpreting

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4. The extra burden imposed on the courts would be enormous. As TRU points out (A10), in 1996, the American Arbitration Association alone administered a total of 70,516 cases. Under TRU's standard, a court would have to thoroughly and meticulously review the record of each case to see if any decisions of the arbitrator were clearly erroneous. This creates a potential for more than 70,000 additional cases for the courts each year.

5. This assumes that the grounds set forth in 9 U.S.C. § 10 are available to attack an award rendered under the Convention, a point which YAAS does not concede. YAAS argued in the Court of Appeals that the grounds asserted by TRU in attacking the award could not apply in this case because those grounds find their source in the FAA. Because the award at issue is an international award within the terms of the Convention and the grounds for denying enforcement

(Cont'd)

the statutory provisions and indeed "manifest disregard of the law" is, in some respects, a judicially created addition to the grounds articulated in the statute. However, manifest disregard of the law itself is firmly rooted in the provisions of the FAA, for if an arbitrator has recognized that a point of law exists and controls an issue, and simply refuses to apply it, the arbitrator is guilty of misconduct, 9 U.S.C. § 10(a)(3), has exceeded his powers, or has imperfectly executed them, 9 U.S.C. § 10(a)(4).[6]

Indeed, the context of this Court's statement in *Wilko v. Swan, supra,* regarding manifest disregard of the law was the recognition that a United States court lacks the statutory authority to review arbitrators' decisions for legal error:

> In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law.

346 U.S. at 436-37.

(Cont'd)
of such an award found in Article V are exclusive, under the terms of the Convention as well as under the implementing legislation, 9 U.S.C. § 207, the FAA provisions do not apply. The Court of Appeals disagreed, holding that the grounds for setting aside an award found in 9 U.S.C. § 10 may apply to an award governed by the Convention if the award is rendered in the United States. (A66).

6. TRU's statement that some showing of misconduct by the arbitrator is required under the manifest disregard standard is correct. (Petition at 12). That ground is expressly articulated in the FAA, and is the standard by which courts are bound.

Thus, the very standard advocated by TRU exceeds the authority granted by Congress to the courts to review arbitral awards. TRU's petition should be denied.

III.

THE ARBITRAL AWARD WOULD BE CONFIRMED EVEN UNDER A CLEARLY ERRONEOUS STANDARD OF REVIEW.

As demonstrated in Point II *supra*, the clearly erroneous standard of review should not be applied by appellate courts reviewing foreign arbitral awards. However, even assuming *arguendo* that the standard of review proposed by TRU had been applied by the lower courts to assess the validity of the Award, the Award would have been confirmed.

In the first instance, TRU provides no contours to the clearly erroneous standard of review that it advocates. The clearly erroneous standard is one applied by Courts of Appeals in reviewing District Court findings of fact. Fact findings are determined to be clearly erroneous if, and only if, an appellate court has "a definite and firm conviction that a mistake has been committed." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 623 (1993). This standard requires an appellate court to defer to the lower court even if the court believes it would have assessed the evidence differently or reached a different conclusion. Indeed, as long as the lower court's assessment of the evidence is

> plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1984). *Accord United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949) ("A choice between two permissible views of the weight of the evidence is not 'clearly erroneous.' "). Therefore, even if the TRU standard was applied, the arbitrator's determinations would be presumed to be correct and could not be overturned simply because a court may have a different view. As long as there is support in the record, the award would have to be confirmed.

In this case, the arbitrator issued an extensive and well reasoned 47 page opinion in support of the final Award. (A10-47). In that opinion, he expressly referred to and interpreted all of the relevant contractual provisions, cited to and applied the controlling legal authority in New York for damages based upon lost profits, judged the demeanor of the witnesses called by both sides, and thoroughly weighed the evidence submitted during the hearings, ultimately ruling in favor of YAAS. The arbitrator's findings cannot be overturned for clear error because they are completely supported by the record.

A. The Arbitrator's Liability Findings Were Not Clearly Erroneous.

TRU claims that errors were made by the arbitrator when he interpreted the contractual provisions of the L&T Agreement against TRU. Principally, TRU contends that the arbitrator erroneously interpreted paragraphs 8.01 and 2.07 of the L&T Agreement. (Petition at 17). But there is no evidence to suggest that the arbitrator misinterpreted these contract provisions. Rather, he simply rejected TRU's proffered interpretations for those provisions because there was no evidence to support them.

1. Paragraph 8.01 of the L&T Agreement

The arbitrator's interpretation of paragraph 8.01 is supported by the plain language of the L&T Agreement and by other evidence

offered at the proceedings. In fact, the Partial Award makes clear that the arbitrator considered the contract language as well as a record that was jointly agreed upon and submitted by the parties. (A12). In rejecting TRU's construction of paragraph 8.01 — the same construction that TRU proffers here — the arbitrator found that YAAS and TRU agreed that "the 'initial period' could continue indefinitely for successive five year periods if YAAS actually continued to open stores during the initial period." (A6). The arbitrator also found that TRU could not divest YAAS of any of the rights it had under the Agreements, including the right to open new stores, by issuing of a notice of nonrenewal, whether timely or not.[7] (A7). Thus, the arbitrator interpreted paragraph 8.01 to permit YAAS to extend the initial term of the Agreements by opening "a new store at any time up to the last day of the initial period . . ." (A6-7).

Even a cursory review of the Partial Award, which was devoted exclusively to this issue, demonstrates that the arbitrator was absolutely right in his interpretation of these provisions. But even if he was not, TRU has not demonstrated that the arbitrator's interpretation of paragraph 8.01 was unsupported by the language in the L&T Agreement. At most, TRU has argued that the arbitrator should have reached a different conclusion. This baseless assertion does not demonstrate that the arbitrator's interpretation of paragraph 8.01 was clearly erroneous.

2. Paragraph 2.07 of the L&T Agreement

TRU also repeats its argument that the arbitrator misinterpreted and disregarded paragraph 2.07(b) of the L&T Agreement, which obligated YAAS to consult with TRU about the "location, size, design, construction and layout" of the stores and to comply with TRU standards for those stores. (Petition at 17). Thus, according to TRU, the arbitrator was wrong when he found that "[TRU] had invoked paragraph 2.07 of the agreement as a 'mere pretext to

7. TRU's first notice of nonrenewal was not timely. (A13).

make it *impossible* for [YAAS] to fulfill the condition for extension of the initial term." (Petition at 17).

There is no evidence that the arbitrator misinterpreted paragraph 2.07 or erred when he found that TRU, *after it had issued a notice of termination*, invoked the conforming stores provision solely to prevent YAAS from opening a store and extending the Agreements. Indeed, the evidence suggests that TRU's interpretation of the provision was irrelevant to the arbitrator's analysis. As the arbitrator observed:

> I am not persuaded that the stores contemplated in the Agreements in 1982 were what TRU currently characterizes as "conforming" stores. Moreover, the whole course of dealing between TRU and YAAS over the period from 1982 to 1992 shows that TRU did not care at all about the size, shape or location of YAAS's toy stores. . . . TRU has abandoned YAAS to practical autonomy regarding toy stores in the Territory. TRU was being compensated under the Agreements by royalties and commissions, payable whether or not YAAS's toy stores were profitable. Given this background, I find that TRU's insistence, after it had given notice of termination, on holding YAAS to its current standards for "conforming" stores is a mere pretext to make it impossible for YAAS to fulfill the condition for extension of the initial term.

(A29). Simply put, the arbitrator found that TRU was estopped from relying on the conforming stores provision because it ignored those standards over the course of the Agreements and then attempted, by its deception and nonperformance, to prevent YAAS from meeting those supposed standards.

TRU further claims the arbitrator ignored undisputed evidence that YAAS could not have opened a toy store in time to extend the

Agreements. (Petition at 17). TRU is wrong and fails to inform the Court that the record contained ample evidence that YAAS could have opened a store in the four and one-half months between the time TRU issued its notice of termination and the expiration of the initial term of the Agreements. (A30-34; Staley Tr. 2687, 2671-72). As the arbitrator held:

> Could YAAS have opened a toy store between September 2, 1992 and January 16, 1993? I find that it could have.
>
> YAAS is a large well-financed organization. At the time in question it owned substantial real estate in Kuwait and by leasing could have had access to other real estate. One of its affiliates was a large construction firm. Given that the rights YAAS had were so valuable and that to extend the initial term for five more years required merely the opening of a single toy store, I find that YAAS could and would have mustered sufficient capital and manpower to accomplish this relatively modest task.

(A29-30).

B. The Arbitrator's Damages Findings Were Not Clearly Erroneous.

TRU also claims that the arbitrator's findings on damages were irrational because: (i) YAAS lost money during its ten year relationship with TRU; and (ii) YAAS "asked for only $2 million to relinquish its rights under its contract with [TRU] in September 1993, a full year *after* [TRU's] alleged breach of contract." (Petition at 18-19). TRU also argues that the arbitrator's application of the leading lost profits case in New York, *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 502 N.Y.S.2d 131 (1986), "was just plain wrong." (Petition at 19). TRU's arguments are devoid of merit.

First, it was not error under New York law for the arbitrator to award damages to a business with a limited history of profits. In fact, it would have been error for the arbitrator to refuse to award damages simply because YAAS lost money. In *Lamborn v. Dittmer*, 873 F.2d 522, 533 (CA2 1989), the Court of Appeals found that plaintiffs proved damages with sufficient certainty, even though plaintiffs' commodities partnership had sustained substantial losses, because the partnership had shown an upward trend in the six months before defendant unilaterally terminated the relationship. *See also Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 567 (CA2 1970). TRU offers no contrary authority.

YAAS was profitable after the Gulf War. (A105). Moreover, as the arbitrator expressly found, YAAS likely would have turned a profit much sooner if TRU had not "stall[ed], stonewall[ed] and obstruct[ed]" YAAS's efforts throughout their relationship. (A25) Accordingly, YAAS's losses over the life of the Agreements were not material to the arbitrator's analysis.

Second, TRU's statement that YAAS valued the toy business at $2 million is patently false. In 1993, after TRU had breached the Agreements, YAAS and TRU discussed a $2 million payment for the inventory YAAS had on hand after termination. The figure was not based upon an assessment of the value of the toy business in 1993. Significantly, TRU did not put it *any* evidence to the contrary. Indeed, its own witness, Keith Van Beek, testified that the value of YAAS's operating losses was $2 million. (A109). Mr. Van Beek did not testify, as TRU here suggests, that Mr. Kadrie had valued the toy business at $2 million.

The arbitrator expressly ruled that there was no evidence of a $2 million buyout. (A24). Reviewing the record, the Court of Appeals concurred with the arbitrator:

> As to the purported $2 million buyout offer, no witness has testified that the $2 million figure was

> an estimate of the value of [YAAS's] toy business. Kadrie, the primary [YAAS] officer involved with the toy business, testified that, in his understanding, settlement with [TRU] would serve to provide [YAAS] "some relief on the cost of liquidating [its] inventory." [citation omitted] Accordingly, [YAAS] argues that $2 million was the value [YAAS] placed on its inventory at the time. Furthermore, according to a [TRU] executive, Kadrie, in making this offer, expressly stated that the $2 million was to recoup losses [YAAS] had incurred in trying to develop the business. Therefore, there is no proof that this figure was [YAAS's], or anyone else's, estimation of the value of the business. Thus, the arbitrator did not manifestly disregard lost profits law in refusing to treat the $2 million figure as a buyout offer.

(A73-74).

The arbitrator's analysis of the lost profits law of New York also survives the strictest scrutiny. The arbitrator considered, cited and applied a leading case on damages in New York, *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 502 N.Y.S.2d 131 (1986), before he determined an appropriate damages figure. Under *Kenford* and its progeny, lost profits may be awarded as damages in a breach of contract action, unless the lost profits calculations are found to be too speculative. *See Ashland Management v. Janien*, 82 N.Y.2d 395, 403, 604 N.Y.S.2d 912, 916 (1993); *Kenford*, 67 N.Y.2d at 261, 502 N.Y.S.2d at 132; *Int'l Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 85 (CA2 1996). TRU does not claim that the arbitrator did not understand the lost profits law; rather, TRU alleges that the arbitrator erred when he refused to find that the damages sought by YAAS were speculative. (Petition at 19). This contention has no merit.

The arbitrator, applying *Kenford*, found that damages were not precluded in this case because YAAS's damage calculations

were premised on very detailed business projections prepared by TRU (Exhibit 1015) prior to its breach of the YAAS Agreements. (A35, 37-38). The New York Court of Appeals has held that this type of damage evidence is reliable and sufficiently certain evidence of lost profits. *Ashland Management*, 82 N.Y.2d at 406, 604 N.Y.S.2d at 917. Accordingly, the arbitrator did not misunderstand or misapply the law of damages in New York.

Moreover, there is substantial evidence in the record supporting the Award as a whole and each of the individual components of the Award. Indeed, the centerpiece of the damages case presented by YAAS's expert, Robert Sherwin, was Exhibit 1015, a 12 year pro forma prepared by TRU that projected the operating results associated with the opening of TRU toy stores in YAAS's territory. (A37-39).

In discussing Mr. Sherwin's expert opinion, the arbitrator made the following findings about TRU's Exhibit 1015:

> I found that Mr. Sherwin's report and testimony were credible in the main and that I can place reliance on his report and testimony in fashioning the award that I have determined is the fair outcome of this case.
>
> * * *
>
> Mr. Sherwin performed two alternative calculations of YAAS's damages that may be called, respectively, the "Cash Flow Analysis" and the "Franchise Fee Analysis."
>
> For the Cash Flow Analysis, Mr. Sherwin performed a damage calculation to measure what YAAS would have earned if, in the absence of TRU's breach, YAAS had been able to continue its

operations in Kuwait, to expand those operations, and to develop retail operations in other countries in the Territory, either directly or in joint venture with qualified local companies in those countries.

* * *

Mr. Sherwin based his cash flow projections on Exhibit 1015. This exhibit, as noted above, prepared by Mr. Van Beek . . . was used by TRU to negotiate the up-front franchise fees to be paid by prospective purchasers and to calculate the royalty and purchasing commissions TRU would receive over the life of the franchises. I find that Exhibit 1015 is reliable. In concluding two substantial sales TRU itself used Exhibit 1015 for pricing purposes. It is therefore an inherently reliable document and contains inherently reliable information for purposes of calculating an income stream from new stores in the Territory with reasonable certainty. I find that Mr. Sherwin's reliance on Exhibit 1015 resulted in a cash flow projection for the Territory which is reasonably certain.

* * *

It is not necessary to agree with TRU to conclude that the Franchise Fee Analysis is based on much more conservative assumptions. It assumes that willing third parties would have independently evaluated the projected income streams from the point of view of 1993, as reflected in Exhibit 1015, and would have priced their expectations at that time in the same manner as the two organizations with which TRU actually concluded sales. This assumption, which I find reasonable, looks to the

> question what would a willing third party have paid YAAS for these rights at the time of the breach?
>
> The future risks to the income stream may still have been present. However, it is not disputed that independent third parties were willing, at that time, to calculate their own discount of those risks, and in arms length bargaining, to agree to pay substantial prices for the projected cash flows. TRU accepted those prices. I find that this alternative, while it may well be less than fair to YAAS in not fully reflecting what it could have achieved, is firmly rooted in documented past events. I believe it is the preferable basis for damages in this case, and I so find.

(A36-37, 40).

Thus, there is reliable and uncontroverted evidence supporting YAAS's lost profits calculations. Further, notwithstanding TRU's mischaracterization of the damages award (petition at 17), YAAS was not simply awarded damages for lost profits. (A40, 47). Nearly 60% of the damages (or $27,580,000) is derived from Mr. Sherwin's "Franchise Fee Analysis" and is based on the upfront fees ATA and Al-Futtaim agreed to pay TRU for the right to open TRU toy stores in Saudi Arabia, the United Arab Emirates, Qatar, Bahrain and Oman. These fees are not speculative and, as the arbitrator found, it was rational for YAAS's expert to assume from the " 'feeding frenzy' to open toy stores in the region," that YAAS would have been able to secure suitable partners that

> would have independently evaluated the projected income streams from the point of view of 1993, as reflected in Exhibit 1015, and would have priced their expectations at that time in the same manner as the two organizations with which TRU actually concluded sales.

(A40-42).

In sum, a review of the arbitrator's decision demonstrates that he carefully considered the evidence offered during the damages phase of the arbitration. His conclusion that the Award "may well be less than fair to YAAS in not fully reflecting what it could have achieved, [but which] is firmly rooted in documented past events" (A40), was based on controlling principles of New York law and ample factual support.

The Award can hardly be characterized as clearly erroneous. Each of the arbitrator's determinations is supported by the evidentiary record and governing law. Even if the petition were to be granted, the decision of the Court of Appeals would have to be affirmed. TRU's petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH D. PIZZURRO
Counsel of Record
HERBERT M. LORD
MICHELLE A. RICE
CURTIS, MALLET-PREVOST,
COLT & MOSLE
101 Park Avenue
New York, New York 10178-0061
(212) 696-6000

Attorneys for Respondent

APPENDIX

RESPONDENT'S APPENDIX — TREATIES, STATUTES AND CONTRACTUAL PROVISIONS INVOLVED

Treaties and Statutes

United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differencs between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. [remainder of article omitted]

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3.

Respondent's Appendix

Chapter 2 of the Federal Arbitration Act

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

9 U.S.C. § 201 (1997).

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202 (1997).

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207 (1997).

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C. § 208 (1997).

Contractual Provisions

Additional pertinent provisions of the License and Technical Assistance Agreement Between Toys "R" Us, Inc., TRU (HK) Limited and Yusuf Ahmed Alghanim & Sons, W.L.L., signed and executed on November 16, 1982 in New York, New York, are as follows:

1.08 "YAAS Toy Store" means a retail store engaged primarily in selling TRU-type merchandise, owned or controlled by YAAS or an affiliate thereof, or by any legal entity formed by YAAS or any partner or affiliate of YAAS and other third parties for the purpose of opening a toy store in any country of the territory, [remainder of section omitted]

* * *

3.01 TRU shall provide YAAS during the term of this Agreement with technical advice and assistance pertaining to the establishment, maintenance, operation, development and expansion of YAAS Toy Stores in the Territory.

3.02 TRU shall render advice and assistance to YAAS, initially and on a continuing basis at such times as YAAS reasonably requests during the term of this Agreement, with a view toward helping YAAS realize

success and profitability in its toy business in the territory.

3.03 Without limiting the generality of Sections 3.01 and 3.02, TRU shall render advice to YAAS in the following areas: establishment of initial operating procedures and the revision thereof as changes develop in the art of toy trade and retailing or areas of policy within the territory; establishment of performance guidelines; management training; site planning and selection; office and warehouse procedures; merchandising; store layout and fixturing; marketing; advertising; sales promotion; inventory control and replenishment systems; cost and overhead control systems; cost data for capital goods, equipment and supplies; and methods of employee compensation and incentives.

3.04 At the request of YAAS, TRU shall send to the territory at any time upon reasonable notice, for any reasonable length of time, such of TRU's qualified personnel as TRU deems necessary to render the technical advice and assistance required by YAAS. Such personnel shall act in a consulting capacity only and shall not be responsible for the supervision of personnel employed by YAAS. The salaries and other compensation of all such TRU personnel shall be borne by TRU during the entire term of this Agreement. YAAS shall bear all reasonable board, lodging and local travel expenses of such personnel (in a manner befitting the individuals involved) while they are in the territory. [remainder of section omitted]

* * *

4.01 Although it is in the interests of both parties that the YAAS Toy Store business be financially successful, YAAS recognizes that it alone bears the responsibility for raising the necessary capital to finance the business (including the purchase of merchandise), acquiring or constructing the necessary store and warehouse facilities, and retaining the necessary management and other personnel for the operation of the business. YAAS acknowledges that, except for the services which TRU has specifically agreed in this Agreement to provide, TRU has no obligation, financial or otherwise. YAAS also acknowledges that TRU's decision to participate in the Toy Store business as set forth in this Agreement is predicated on the understanding that YAAS will use its best efforts to make the YAAS Toy Store business profitable.

Likewise, TRU acknowledges that YAAS's decision to resort to TRU's services as hereunder set forth is predicated on the understanding that TRU will use its best efforts within its areas of responsibility under this Agreement to make the YAAS Toy Store business profitable.

* * *

5.01 YAAS will pay TRU a fee equal to three per cent (3%) of all net sales of (a) all merchandise sold at retail by YAAS Toy Stores in the territory during the term of this Agreement and (b) all TRU-type merchandise sold by YAAS pursuant to Section 4.03(a) and (c) during the term of this Agreement, [remainder of Section omitted]

* * *

7.01 TRU agrees that, during the term of this Agreement, it will not enter into any other agreement with any person providing for the granting of trademark licenses or the furnishing of technical advice and assistance with respect to any toy store business in the territory.

The pertinent provisions of the Supply Agreement Between TRU (HK) Limited and Yusuf Ahmed Alghanim & Sons, W.L.L., signed and executed on November 16, 1982 in New York, New York, are as follows:

2.01 Subject to Section 2.02, YAAS will order and purchase through TRU-HK YAAS's requirements of TRU-type merchandise for all YAAS Toy Stores in the territory.

* * *

3.01 YAAS will pay TRU-HK compensation equal to five per cent (5%) of TRU-HK's invoice price of all merchandise purchased by YAAS through TRU-HK during the term of this Agreement. [remainder of section omitted]

* * *

4.01 TRU-HK agrees that, during the term of the Agreement, it shall not sell at wholesale, distribute or consign any TRU-type merchandise to any person in the territory except YAAS. TRU-HK further agrees not to effect such sales, distributions or consignments under circumstances known to TRU-HK which make it likely that such merchandise will be sold in the territory, [remainder of section omitted]

* * *

6.10 In the event of any dispute or difference of opinion between the parties arising out of or in connection with this Agreement, each of the parties shall use its best efforts to settle such dispute or difference of opinion amicably by negotiation. All disputes which cannot be amicably settled by negotiation shall be finally settled by arbitration to be held in New York City in accordance with the Rules of the American Arbitration Association, and judgment upon any award rendered in any such arbitration may be entered in any court of competent jurisdiction.